INDEX

	Pages
Petition for Writ of Certiorari:	
Summary Statement of the Matter Involved	1-5
Reasons Relied Upon for the Allowance of the Writ	5-12
Prayer for the Writ	12-13
Brief in Support of Petition for Writ or Certiorari:	
Opinions of the Courts Below	15
Jurisdiction	16
Statement of the Case	17-21
Specifications of Error	21-23
Summary of the Argument	23-26
Argument	26-33
Point 1—The court below erred in holding that petitioner's demand for transfer, plus Davis' contentions and the pendency of the garnishment proceeding, raised "technical legal issues" that relieved respondent of any duty to transfer	26-32
Point 2—The court below erred in holding that the fact that petitioner bid in the stock for $1.00 per share raised a "technical legal issue" that relieved respondent of the duty to transfer	32-33
Conclusion	34

AUTHORITIES

Pages

Statutes:

U. S. C. A., Title 28, Sec. 347(a); Judicial Code, Sec. 240, as amended by the Act of February 13, 1925 16

List of Cases:

Bayard v. Bank, 52 Pa. St. 232 12
Bower v. Yellow Cab Co., 13 S. W. (2d) 708 (Tex. Civ. App.) 6, 27-28
Cavitt v. Gulledge, 255 S. W. 784 (Tex. Civ. App.) 8, 33
Davis v. Hardwick, 95 S. W. 359 (Tex. Civ. App.) 8, 33
Erie Railroad Co. v. Tompkins, 304 U. S. 64 16
First National Bank in Canyon v. Gamble, 134 Tex. 112 ..... 7, 27
Gresham v. Island City Savings Bank, 21 S. W. 556 (Tex. Civ. App.) 6, 28
Howe v. Roberts, 209 Ala. 80 12
King v. D. Sullivan & Co., 92 S. W. 51 (Tex. Civ. App.) 8, 33
Klaus, In re, 67 Wis. 401 ..... 11, 32
London, Paris & American Bank v. Aronstein, 117 Fed. 601 (9th Circuit), cert. den, 187 U. S. 641 9, 29-30
Mobley v. New York Life Insurance Co., 295 U. S. 632 16
O'Neil v. Wolcott Mining Co., 174 Fed. 527, (8th Circuit) 9-10, 30, 31
Pacific American Gasoline Co. of Texas v. Miller, 76 S. W. (2d) 833 (Tex. Civ. App.) 7, 27
Pecos & N. T. Ry. Co. v. Porter, 183 S. W. 98 (Tex. Civ. App.) 6, 28
Rio Grande Cattle Co. v. Burns, Walker & Co., 82 Tex. 50 ..... 6-7, 27, 28-29, 30
Seeligson & Co. v. Brown, 61 Tex. 114 ..... 8, 33
Shear Co. v. Wilson, 292 S. W. 531 (Tex. Com. App.) 11-12
Spangenberg v. Nesbitt, 22 Cal. App 274 ..... 10, 11, 31, 32
State ex rel. v. McIver, 2 S. C. (2 Rich.) 25 ..... 10, 31

Pages

Tobias v. Wolverine Mining Co., 32 Idaho 576 ..... 11, 32
United North & South Development Co. v. Rayner, 124 F. (2d) 512 ..... 4, 5, 15
West v. American Telephone and Telegraph Co., 311 U. S. 223 16
Wichita Royalty Co. v. City National Bank of Wichita Falls, 306 U. S. 103 16

Text Books and Other Authorities:

Christy, The Transfer of Stock, p. 466 ..... 11, 32
18 C.J.S., Corporations, sec. 435, p. 1051 ..... 10-11, 31

Supreme Court of the United States

OCTOBER TERM, 1941

No.....

CHARLES B. RAYNER, *Petitioner*

vs.

UNITED NORTH & SOUTH DEVELOPMENT COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

Your petitioner, Charles B. Rayner, respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved

Petitioner sued respondent for actual damages, alleging that respondent had converted 11,709 shares of stock in respondent corporation, the conversion having occurred when respondent refused

petitioner's request to transfer the shares which had been duly endorsed in blank by Edgar B. Davis, the record owner thereof, and pledged by him to petitioner to secure certain promissory notes executed by Davis and payable to petitioner. (R. 1-5.) Demand for transfer was made after petitioner, upon default by Davis, had, as permitted by the pledge agreement (R. 30), sold the shares at public auction and bought them in himself. (R. 48-49.)

Respondent answered that it refused to make the transfer because Davis had notified it that his pledge of the stock to petitioner was not supported by an adequate consideration; because Davis had notified it that the foreclosure sale at which petitioner bought in the pledged stock was invalid and that the stock had sold for an inadequate price; and because the State of Massachusetts had impounded the stock by running a writ of garnishment on respondent to reach any stock in respondent owned by Davis. In connection with the garnishment proceeding it was alleged that the trial court had entered judgment quashing the writ of garnishment and discharging the garnishee, but that the State of Massachusetts had appealed from such judgment and that the appeal was pending at the time petitioner's demand for transfer was made. Respondent also alleged that in its refusal it relied upon the advice of counsel that it should not make the transfer in view of the claims made by Davis and in view of the garnishment proceeding. (R. 6-15.)

The trial judge (Judge McMillan) held that under the law of Texas respondent was liable for conversion for its refusal to transfer the stock. He found from uncontradicted evidence, or at least from the

great weight of the evidence, that in refusing to make the transfer, ostensibly because of Davis' claims and because of the appeal in the garnishment proceeding, respondent was not acting in good faith but was seeking to protect Davis, who owned 84% of its stock (R. 93), who was Chairman of its Board of Directors (R. 184), who "dominated and controlled the election of officers and directors . . . and the determination of employees, and has dominated and controlled the acts of the corporation" (R. 212); that its refusal to transfer the stock "was not done in good faith, but to obey the request of Davis and hinder Rayner (petitioner) in the collection of his debt" (R. 213); that respondent knew that "the reasons for refusal for such transfer did not in fact constitute valid reasons for such refusal" (R. 213); and further knew that Davis "had time and time again admitted the indebtedness, and that he had stated that he was going to pay it" (R. 213); and further knew that "his grounds of protest were frivolous" (R. 213).

Referring specifically to Ainsworth, Vice-President of respondent (R. 81), the trial court found:

"That H. M. Ainsworth, who on November 8, 1940, signed the letter of refusal on behalf of the company to transfer 11,709 shares of stock to C. B. Rayner, well knew of Davis' debt to Rayner, and of the pledge of 11,709 shares of stock by Davis to Rayner, and knew that such stock was duly indorsed by Davis for transfer on the books of the corporation; and that he had known such facts for many years, and knew that on many occasions Davis had acknowledged the validity of the debt and pledge, and many times had expressed an intention and desire to pay the same." (R. 212.)

The trial judge further found that petitioner's notes and pledge of stock were supported by an adequate consideration; that petitioner had full legal title to the stock at the time it was presented for transfer (R. 205-207, 214); and that this was known to respondent. (R. 213.)

On appeal these findings, fully supported by the evidence, were ignored by the Circuit Court of Appeals; that court disposed of the case as if the corporation had acted independently in good faith to protect its interest in view of the conflicting claims asserted as to ownership of the stock. The findings of the district court affirmatively show that the corporation was not acting independently of Davis but in concert with Davis. (R. 212-213.)

In its opinion the Circuit Court of Appeals takes that part of the trial court's oral opinion in which it is stated that "Ainsworth . . . had on prior occasion attempted to adjust the matter of Rayner's (petitioner's) claim for the purpose of getting it straightened out on Davis' behalf," and concludes that it "indicates that there had been a controversy between plaintiff (petitioner) and Davis with respect to the pledging of this stock." (124 Fed. (2d) 513.) This conclusion of the Circuit Court of Appeals is wrong; there has never been any such controversy. The trial court found that Davis had always acknowledged his debt to petitioner and had many times promised to pay it. (R. 207-208.) This finding is based upon undisputed evidence. (R. 179-183.) Furthermore, the evidence shows without dispute that Ainsworth's conversations with petitioner were not about the consideration for the notes, but were for the purpose of reaching some agreement

for the payment of Davis' *debt* to petitioner. Ainsworth was attempting to work out some settlement of an admitted obligation. (R. 193-194.)

The trial court held that the fact that a writ of garnishment had been run on respondent to impound Davis' stock in respondent did not justify respondent's refusal to transfer, since, at the time petitioner demanded a transfer, the writ of garnishment had been quashed and the garnishee discharged. He held that, under Texas decisions, this placed the parties in the same position they would have occupied had no writ ever been run; and that the fact that an appeal had been taken from the order quashing the writ and discharging the garnishee was immaterial because no supersedeas bond was filed, as required by Texas law, to preserve the status quo pending the appeal. (R. 202-203, 208-210, 214.) The Circuit Court of Appeals did not question this holding but held that the appeal of the garnishment proceeding and petitioner's demand for a transfer raised "a technical legal issue" that the officers of respondent were not called upon to decide. (124 Fed. (2d) 513.)

Reasons Relied Upon for the Allowance of the Writ

1. Jurisdiction in this case rests upon diversity of citizenship, and the legal issues presented must be decided in accordance with the law of Texas. The Circuit Court of Appeals, in reversing the trial court's judgment, refused to follow the law of Texas in the following respects:

(a) Under Texas decisions the refusal of a corporation to transfer stock properly endorsed for transfer gives the party making the request the

option of compelling a transfer through a mandamus proceeding, or of recovering damages caused by the corporation's conversion of the stock. *The Rio Grande Cattle Co. v. Burns, Walker & Co.*, 82 Tex. 50, 57; *Bower v. Yellow Cab Co.*, 13 S. W. (2d) 708 (Tex. Civ. App.); *Gresham v. Island City Savings Bank*, 21 S. W. 556 (Tex. Civ. App.). The trial court so held. (R. 203.) The Circuit Court of Appeals held, contrary to the Texas rule, that respondent's refusal to transfer petitioner's stock relegated petitioner to a mandamus proceeding; that petitioner had no choice between such a proceeding and an action for conversion.

(b) Under Texas decisions the good faith of the defendant is no defense in an action for damages for conversion where only actual damages are sought. *Pecos & N. T. Ry. Co. v. Porter*, 183 S. W. 98, 102 (Tex. Civ. App.). Admitting for the sake of argument that respondent acted in good faith in refusing to transfer petitioner's stock, and ignoring the trial court's unimpeached findings to the contrary, the fact remains, nevertheless, that the Circuit Court of Appeals failed to follow the Texas decisions holding that the question of good faith is immaterial.

(c) The above principles are applicable here because under Texas decisions a corporation requested to transfer stock may be called upon to decide "technical legal issues," and may be held liable in damages for conversion if it refuses to transfer after reaching an incorrect decision as to the "technical legal issues." *The Rio Grande Cattle Co. v. Burns, Walker & Co.*, 82 Tex. 50. In that case the corporation was held liable in damages for refusing

to transfer stock where its refusal to transfer was based upon the belief that a certain written instrument entered into by the incorporators turned the corporation into a partnership. The court, in its opinion, admitted that the "agreement under consideration in many of its features assimilates nearer to a partnership in defining the rights and duties of its members than to a corporation" (82 Tex. 55); but held, after some hesitation, that the corporate entity was unaffected by the agreement; and further held the corporation was wrong in its legal conclusion, and liable for conversion for its refusal to transfer.

The Circuit Court of Appeals refused to follow the above holding, and held that respondent rested under no duty to transfer petitioner's stock because petitioner's demand for the transfer raised "technical legal issues" which the officers of respondent were not called upon to decide.

(d) Under Texas decisions the corporate fiction will be disregarded where necessary to prevent fraud. *First National Bank in Canyon v. Gamble*, 134 Tex. 112, 119-120; *Pacific American Gasoline Co. of Texas v. Miller*, 76 S. W. (2d) 833, 851 (Tex. Civ. App.). The trial court followed those decisions and examined into the relationship between Davis and his corporation. He found that Davis controlled respondent and that respondent did his bidding in refusing to transfer petitioner's stock. The Circuit Court of Appeals, on the other hand, completely ignored Davis' domination of respondent and the fact that respondent did his bidding in refusing to transfer petitioner's stock. Consequently, even if, contrary to the Texas decisions, the question of good faith was material, the Circuit Court

of Appeals erred in holding that the issue of good faith should be determined without examining into the relationship between Davis and his corporation.

(e) Under Texas decisions petitioner, a pledgee of stock properly endorsed for transfer, had the right to have the same transferred on the books of respondent corporation, irrespective of whether or not there had been a foreclosure of the pledge lien. *Seeligson & Co. v. Brown*, 61 Tex. 114, 117; *Cavitt v. Gulledge*, 255 S. W. 784, 787 (Tex. Civ. App.); *Davis v. Hardwick*, 94 S. W. 359, 361 (Tex. Civ. App.). Consequently, the Circuit Court of Appeals erred in giving consideration to the fact that petitioner bought in the stock at the foreclosure sale at a price considerably lower than its real value (124 Fed. (2d) 513), this having occurred because of Davis' action in notifying prospective purchasers that, if they bought the stock, they would be buying a lawsuit. (R. 49-51.) As petitioner had the right to have the stock transferred, irrespective of the foreclosure sale, what occurred at the sale was immaterial. Furthermore, under Texas decisions, petitioner, the pledgee, having bought in the stock, Davis must be credited on his notes with an amount equivalent to the actual value of the stock at the time it was sold, irrespective of the actual selling price. *King v. D. Sullivan & Co.*, 92 S. W. 51, 52-53 (Tex. Civ. App.). Therefore Davis cannot possibly be prejudiced by the price at which petitioner bought in the stock.

2. The decision of the Circuit Court of Appeals in this case is in conflict with the following decisions of other Circuit Courts of Appeals:

(a) *London, Paris & American Bank v. Aronstein*, 117 Fed. 601 (9th Circuit), cert. den. 187 U. S. 641, in which case a corporation was held liable in damages for refusing to transfer stock upon demand of an executor under the belief that the law of England, which required that the decedent's estate be administered upon at the domicile of the corporation in England before a transfer could be made, was controlling. The court held, in four pages of legal reasoning, that certain provisions in the California Constitution applied and overrode the law of England which would have required administration of the decedent's estate in England. That case shows clearly that the fact that a demand for the transfer of stock raises "a technical legal issue" will not excuse the corporation for its refusal to transfer. The corporation must decide the technical legal issue and must decide it correctly. As pointed out at pages 6-7 *supra*, the Texas rule is the same. The Circuit Court of Appeals held the contrary.

(b) *O'Neil v. Wolcott Mining Co.*, 174 Fed. 527, 533-534 (8th Circuit), in which case the court held that a corporation, if confronted with conflicting claims to certain stock and a demand for its transfer, "cannot assume the functions of a Court and by their determination conclude the rights of the parties; and if resort is not had to the Courts within a reasonable time by the corporation or the protestant to determine the rights of the parties, it becomes the duty of the corporation to register the stock in the name of the first claimant." With reference to the naked claim of a third party, the court stated: "The corporation when it refuses, and upon

the trial of the issue the court, must be able to see from the facts established that there is some question to be tried. The mere claim of the stock is not sufficient."

In the instant case respondent took the position that Davis' claims relieved respondent of all duty in the premises. It did not file an interpleader suit; it did not get Davis to file any character of suit; and it did not even produce Davis as a witness at the trial to substantiate his claims, although he was available as a witness and although the respondent was relying upon the claims made by him. (R. 142, 195-196.) The Circuit Court of Appeals held that respondent rested under no duty to take any action whatsoever.

3. The opinion of the Circuit Court of Appeals is not supported by the authorities therein cited and is in conflict with the weight of reasoned authority, authority which it must be presumed the Texas courts would follow, in the following respects:

(a) The general rule is that a corporation, if confronted with conflicting claims to certain stock and a demand for its transfer, must either file an interpleader suit to get the question decided, get the adverse claimant to file some character of suit that will get the question decided, or transfer the stock to the first claimant. *State ex rel. v. McIver*, 2 S. C. (2 Rich.) 25, 44; *Spangenberg v. Nesbitt*, 22 Cal. App. 274; *O'Neil v. Wolcott Mining Co.*, 174 Fed. 527, 533-534 (8th Circuit); the general rule is laid down in 18 C.J.S., Corporations, sec. 435, p. 1051, one of the authorities relied upon by the Circuit Court of

Appeals. As pointed out at page 9, *supra*, this is the Federal rule. The Circuit Court of Appeals held, on the contrary, that Davis' claims relieved respondent of all duty in the premises; that it was unnecessary for respondent to file an interpleader suit or to get Davis to file some character of suit.

(b) The general rule is that a corporation refusing to transfer stock must notify the party seeking the transfer of the reasons for its refusal, and that any reason not assigned at that time is waived and cannot be set up thereafter. *Tobias v. Wolverine Mining Co.*, 52 Idaho 576, 585-586; *In re Klaus*, 67 Wis. 401, 402-403; *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 280; Christy, *The Transfer of Stock*, page 466. The Circuit Court of Appeals held, on the contrary, that Davis' claim that his notes and pledge of stock were not supported by an adequate consideration and that the stock sold for an inadequate price justified respondent in refusing to transfer petitioner's stock although no mention of those defenses was made by respondent when it refused to transfer the stock. (R. 59-60.)

(c) The authorities cited by the Circuit Court of Appeals do not sustain its decision. Two of the authorities, 18 C.J.S., Corporations, sec. 435, and the case of *Spangenberg vs. Nesbitt*, 22 Cal. App. 274, are discussed above. Those authorities, insofar as they bear upon the question of adverse claims to corporate stock, fully support petitioner's position.

Shear Co v. Wilson, 292 S. W. 531 (Tex. Com. App.), another case cited by the Circuit Court of Appeals, merely holds that where the president

of a corporation had sold 50 shares of its stock to Mrs. Wilson and had endorsed such certificate in blank, the corporation was on notice that Mrs. Wilson was the owner of the certificate, and when the certificate was presented for transfer by another, there being no endorsement by Mrs. Wilson thereon, the corporation was liable for conversion in reissuing the stock to such other person.

In *Bayard v. Bank*, 52 Pa. St. 232, another case cited by the Circuit Court of Appeals, it was held that the corporation had the right to refuse to transfer until the trustee who had demanded the transfer showed his authority under the trust indenture to make the sale and to demand the transfer.

In *Howe v. Roberts*, 209 Ala. 80, another case relied upon by the Circuit Court of Appeals, an action had been brought in equity to compel a transfer of stock by the corporation. The court stated that in its opinion such a procedure was an ideal one.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket 10038, United North & South Development Company, Appellant, vs. Charles B. Rayner, Appellee, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and that of the district court

affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

CHARLES B. RAYNER, Petitioner
By JAMES D. WILLIAMSON
JOHN W. STAYTON
Counsel for Petitioner

BLACK, GRAVES & STAYTON
Of Counsel

Supreme Court of the United States

OCTOBER TERM, 1941

No._____

CHARLES B. RAYNER, *Petitioner*

vs.

UNITED NORTH & SOUTH DEVELOPMENT COMPANY

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions of the Courts Below

The opinion of the Circuit Court of Appeals is reported as *United North & South Development Co. vs. Rayner*, 124 F. (2d) 512. The oral opinion of the district court, delivered from the bench at the conclusion of the trial, is in the Record at pages 198-204. It has not been officially reported.

II.

Jurisdiction

1. The judgment of the Circuit Court of Appeals for the Fifth Circuit to be reviewed was entered December 29, 1941. (R. ~~224-228.~~) The petition for rehearing, filed January 17, 1942, (R. ~~230-235~~), was entertained by the court and was denied on February 2, 1942 (R. ~~236~~).

2. In the petition for the writ of certiorari it is pointed out that the Circuit Court of Appeals has decided important questions of local law in a way in conflict with applicable local decisions; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter; and has generally failed to follow the weight of reasoned authority.

3. The jurisdiction of this Court is believed to be sustained under U. S. C. A., Title 28, Section 347(a); Judicial Code, Sec. 240, as amended by the Act of February 13, 1925.

4. The following cases are believed to sustain the jurisdiction of this Court:

West vs. American Telephone and Telegraph Co., 311 U. S. 223;

Wichita Royalty Co. vs. City National Bank of Wichita Falls, 306 U. S. 103;

Erie Railroad Co. vs. Tompkins, 304 U. S. 64;

Mobley vs. New York Life Insurance Co., 295 U. S. 632, 633-634.

III.

Statement of the Case

In addition to the summary statement of the matter involved contained in the petition, petitioner calls the court's attention to the following:

After respondent corporation was organized in 1926 or 1927, its operations were directed by a "Management Committee," composed of petitioner and four other men, under an agreement with Edgar B. Davis that they were partners with Davis in the enterprise, and that they would receive a fair share of any profits that might be made by Davis through the company's operations. (R. 67, 71-72.) Through the efforts of the Management Committee a valuable oil field known as Darst Creek was acquired and developed for respondent and was later sold to Louisiana Oil & Refining Company for $2,250,000.00, payable out of oil. (R. 72.) After the above sale Davis gave petitioner as his share of the profits Davis' promissory note in the sum of $200,000.00. (R.78.) This note was later exchanged for a contract under which Davis was obligated to pay petitioner $200,000.00 within two years. (R. 78-79.) The contract was extended for some four months. (R. 74.)

In September, 1931, the proration laws of Texas prevented the Louisiana Company from producing 4000 barrels of oil daily as it had contracted to do, and the Louisiana Company turned the Darst Creek Field back to respondent. (R. 73.) The field has produced some 4,000,000 barrels of oil. (R. 73.) It is still producing, and under proration its 29 wells

are producing about 13,000 barrels of oil monthly. (R. 159.)

Petitioner in 1934 released Davis from the contract in exchange for five promissory notes of Davis, aggregating $234,176.13. (R. 74-75; release R. 38-39.) The first four of the five notes were later renewed and extended by Davis by endorsement thereon. (R. 20, 23, 26, 31.) The stock involved in the instant case was pledged to secure those notes and was properly endorsed for transfer. (R. 19-35.)

During the period from March 1, 1935, to April 4, 1938, Davis repeatedly wrote petitioner letters in which Davis acknowledged his "indebtedness" to petitioner and the sacredness of his "obligation" to petitioner. (R. 179-183.) Davis has never filed any suit to cancel the notes given petitioner. (R. 195-196.) He was a party to the garnishment suit filed by the State of Massachusetts against respondent to impound Davis' stock in respondent; and, although petitioner intervened in that proceeding and asserted the superiority of his right to Davis' stock pledged to him over the right of the State of Massachusetts to that stock (R. 171-175), Davis did not, by way of answer or otherwise, deny his indebtedness to petitioner.

Davis had a month's notice that petitioner was going to sell the pledged stock (R. 42-43); and after the sale was made (R. 48-49) another two months elasped before petitioner brought the instant suit against respondent. (R. 5.) Petitioner's suit was on file for six months before it was ever tried. (R. 5, 216.) During the entire period of time Davis never brought any suit attacking the validity of his

notes and pledge of stock securing the same. (R. 195-196.)

In Davis' letter to respondent and others in which he protested the sale of the stock by respondent, no claim was made that the notes and pledge of stock were not based upon an adequate consideration. (R. 50-51.)

In 1934 K. C. Baker filed suit against Davis and garnished Davis' stock in respondent corporation. Respondent filed an answer in the garnishment proceeding, and in its answer set out that Davis had pledged 11,709 shares of his stock in respondent to petitioner to secure his "indebtedness" to petitioner. The answer was sworn to as "true and correct" by the Treasurer of respondent corporation. (R. 166-169.) In the garnishment proceeding filed by the Commonwealth of Massachusetts against respondent to impound Davis' stock in respondent, respondent pleaded that Davis had pledged 11,709 shares of his stock in respondent to petitioner. The answer was sworn to as "true and correct" by the Assistant Treasurer of respondent corporation. (R. 104-106, 115.)

Miller Ainsworth, Vice President of respondent corporation, knew of Davis' debt to petitioner and in 1938, 1939, and 1940 had a number of conversations with petitioner in an attempt to work out the payment and settlement of Davis' obligation to petitioner. In these conversations Ainsworth did not contend that Davis was not indebted to petitioner; he merely attempted to work out some settlement of an admitted obligation. (R. 193-194.)

When respondent refused to transfer petitioner's stock, its letter of refusal was written by Ainsworth

and in the letter no contention was made that the notes and stock given to petitioner by Davis were not supported by adequate consideration. (R. 59-60.)

We have set out at pages 2-4, *supra*, the trial court's findings to the effect that respondent was dominated by Davis and that respondent refused to transfer the stock, not because of any bona fide belief in Davis' contentions, but to hinder petitioner in his attempt to collect the debt due him from Davis. In addition to the findings referred to, we call the Court's attention to the fact that Davis, on behalf of respondent, handled most, if not all, of its negotiations with petitioner concerning the transfer of his stock. When petitioner first presented the stock for transfer, Davis, acting on behalf of respondent, refused to make the transfer. (R. 52.) After this first refusal and after petitioner had again demanded transfer of his shares, it was Davis who wrote petitioner on behalf of respondent that he had just had the opportunity "to consult our San Antonio attorneys" and that a final answer would be given petitioner within a few days. (R. 55-56.) The "San Antonio attorneys" referred to by Davis were Davis' personal counsel. (R. 142-143.) The final letter of refusal was written by Ainsworth, who testified that Davis was the man who put him "on notice" that he, Ainsworth, should write petitioner refusing to transfer the stock. (R. 93.)

The garnishment proceeding referred to by the Circuit Court of Appeals was instituted to impound Davis' stock in respondent. On February 10, 1940, judgment was entered quashing the writ of gar-

nishment issued the State of Massachusetts in that proceeding and discharging the garnishee. (R. 120-123.) An appeal was taken from that part of the judgment quashing the writ of garnishment (R. 127), but no supersedeas bond was filed in connection with the appeal. (R. 130.)

Petitioner's demand on respondent that it transfer petitioner's stock was first made on October 21, 1940, some eight months after the quashing of the writ of garnishment (R. 53-54), and was thereafter again made on November 1, 1940. (R. 57-58.)

IV.

Specifications of Error

1. The Circuit Court of Appeals erred in ignoring the trial court's findings:

(a) That respondent knew the reasons given by it for its refusal to transfer petitioner's stock were not valid;

(b) That respondent knew of Davis' debt to petitioner, of the pledge of stock to secure the same, and knew that Davis' "grounds of protest were frivolous";

(c) That, in refusing to make the transfer, respondent did not act in good faith, but to comply with the demands of Davis (who owned 84% of its stock and who "dominated and controlled" the corporation) in order "to hinder Rayner (petitioner) in the collection of his debt."

2. The Circuit Court of Appeals erred in holding, contrary to the law of Texas, that petitioner's

demand for a transfer of his stock, plus Davis' claims and the pendency of the appeal in the Massachusetts garnishment proceeding, presented "technical legal issues" which the officers of respondent could not be expected to decide; and that their acting upon the advice of counsel relieved respondent from liability for conversion for refusing to transfer petitioner's stock.

3. The Circuit Court of Appeals erred in *failing* to hold that, if respondent had any doubt as to its duty to transfer petitioner's stock, it should have either filed an interpleader suit to get the matter determined or should have gotten Davis to file some character of suit to get the matter determined, and that, in the absence of either proceeding, respondent rested under the duty of making the transfer.

4. The Circuit Court of Appeals erred in holding, contrary to the law of Texas, that petitioner "should be relegated to either a mandamus, an injunction, a suit for specific performance, or other proceeding in which the title to the stock can be determined."

5. The Circuit Court of Appeals erred in holding that the fact that petitioner bid in the stock for $1.00 per share (after Davis chilled the bidding), with the consequence that Davis may receive a credit of only $11,709.00 on his notes, "created a legal situation which the officers of defendant (respondent) were not qualified to decide," and that as a consequence respondent was relieved from liability in conversion for its refusal to transfer petitioner's stock because:

(a) Under the law of Texas petitioner was called upon to decide the legal question presented and to decide it correctly;

(b) Under the law of Texas, as petitioner has repeatedly admitted, Davis is entitled to receive as a credit on his notes the value of the stock bought in by petitioner, the pledgee, irrespective of the purchase price;

(c) Under the law of Texas petitioner, as the pledgee of the stock properly endorsed, had the right to have the stock transferred with or without a sale —and consequently what happened at the sale was no concern of respondent.

6. The Circuit Court of Appeals erred in holding, contrary to the weight of reasoned authority, that respondent could urge as a defense to petitioner's suit for conversion Davis' claim that petitioner's notes were without consideration and that the pledged stock, when sold, was sold for an inadequate price, because these two grounds were not mentioned in respondent's letter to petitioner in which respondent refused to transfer his stock.

V.

Summary of the Argument

1. The Circuit Court of Appeals held that respondent could not be held liable for its refusal to transfer petitioner's shares because Davis' claims and the pendency of the appeal in the Massachusetts garnishment proceeding raised "technical legal issues" which the officers of respondent were not

called upon to decide. This holding is erroneous because:

(a) Respondent did not act in good faith belief in these defenses, but knew they were fictitious, and acted to hinder petitioner in his attempt to collect a debt owed him by Davis, who dominated and controlled respondent. Under Texas decisions and under general principles the Circuit Court of Appeals should have looked at the matter realistically and ignored the corporate fiction, as did the trial court. Instead, the Circuit Court of Appeals disregarded the relationship between Davis and his corporation.

(b) Under the Texas decisions and under general principles a corporation called upon to transfer stock has to decide "technical legal issues," and, if the corporation refuses because of an erroneous decision with respect to such issues, it is nevertheless liable for conversion.

(c) The weight of reasoned authority is that a corporation, when confronted with a request for the transfer of stock and with conflicting claims to the stock that present "technical legal issues," must either file an interpleader suit to get those issues decided, or get the adverse claimant to file a suit to get the issues decided, or transfer the stock to the first claimant. The Circuit Court of Appeals held, on the contrary, that because "technical legal issues" arose, as the result of the adverse claims of Davis, respondent was discharged of any liability in the premises.

(d) The weight of reasoned authority is that a corporation refusing to transfer stock must inform

the party seeking the transfer as to its reasons for the refusal, and that any ground not put forward at that time is waived. Respondent did not give as reasons for not transferring petitioner's stock the fact that Davis was contending (a) that his notes and pledge of stock were not supported by an adequate consideration, and (b) that the stock sold for an inadequate price. Consequently, the Circuit Court of Appeals erred in holding that Davis' claims in these respects raised "technical legal issues" which the officers of respondent were not called upon to decide and which relieved respondent of liability for its refusal to transfer.

2. The Circuit Court of Appeals held that, as petitioner bought in the stock for $1.00 per share (Davis having chilled the bidding), Davis may receive a credit of only $11,709.00 on his notes, whereas, the trial court found that the 11,709 shares of stock were worth $8.05 per share, and that this "created a legal situation which the officers of defendant (respondent) were not qualified to decide," and that as a consequence respondent was relieved of liability for its refusal to transfer. This holding is erroneous for the following reasons:

(a) Under the law of Texas respondent was called upon to decide the legal questions presented and to decide them correctly.

(b) Under the law of Texas, as petitioner has repeatedly admitted, Davis is entitled to receive as a credit on his notes the value of the stock bought in by petitioner, the pledgee, irrespective of the purchase price.

(c) Under the law of Texas petitioner, as the pledgee of the stock properly endorsed, had the right to have the stock transferred with or without a sale —and consequently what happened at the sale was no concern of respondent.

(d) Davis, having chilled the bidding, could not complain of the sale price and consequently respondent could not thereby be relieved of liability in conversion for its refusal to transfer the stock.

VI.

Argument

1. (a) The trial court took a realistic view of the case and reached the conclusion that respondent was not a free agent when it refused to transfer petitioner's stock. The trial court found, and the record clearly reflects, that respondent, because of Davis' control of it, played the part of a useful buffer between Davis and petitioner. The Circuit Court of Appeals carried legal formalism beyond all reason by ignoring the relationship between Davis and his corporation and by holding that Davis' claims, without more, relieved respondent of liability for its refusal to transfer petitioner's stock.

The Circuit Court of Appeals held that Davis' unsupported claims were enough; that it was immaterial that they furnished the respondent with an *excuse* rather than a *reason* for its refusal to transfer; that it was immaterial that it acted to protect Davis; and that it was immaterial that it knew Davis' contentions were frivolous. The Circuit

Court of Appeals reasoned that a corporation is a corporation, and a stockholder, a stockholder, and that it was unnecessary to examine into the relationship between them. This was clearly wrong under the Texas decisions, which the Circuit Court of Appeals should have followed, holding that the corporate fiction should be ignored where necessary to prevent fraud. *First National Bank in Canyon v. Gamble*, 134 Tex. 112, 119-120; *Pacific American Gasoline Co. of Texas v. Miller*, 76 S. W. (2d) 833, 851 (Tex. Civ. App.). The trial court looked beneath the corporate shell and found Davis; the Circuit Court of Appeals did not look. The trial court recognized the voice of Jacob; the Circuit Court of Appeals saw only the hand of Esau.

(b) Assuming for the moment, contrary to the trial court's unimpeached findings and the record, that Davis and respondent dealt at arms length, the Circuit Court of Appeals, nevertheless, erred in holding that because "technical legal issues" were raised by petitioner's demand for transfer, Davis' claims and the garnishment proceeding, respondent's officers were discharged of all duty in the premises, and that petitioner was relegated to a mandamus proceeding to compel a transfer. This holding was clearly wrong under Texas law. In Texas the refusal of a corporation to transfer stock properly endorsed for transfer is a conversion of it, and the party requesting the transfer has the option of compelling a transfer by means of a mandamus proceeding or of recovering actual damages caused by the conversion. *The Rio Grande Cattle Co. v. Burns, Walker & Co.*, 82 Tex. 50, 57; *Bower v. Yel-*

low Cab Co., 13 S. W. (2d) 708 (Tex. Civ. App.); *Gresham v. Island City Savings Bank*, 21 S. W. 556, (Tex. Civ. App.)

Under Texas decisions a converter of property is liable in actual damages for the conversion, irrespective of his good faith in the premises. *Pecos & N. T. Ry. Co. v. Porter*, 183 S. W. 98, 102 (Tex. Civ. App.). Consequently, the fact that respondent relied upon the advice of counsel, ostensibly consulted because of the technical legal issues that had arisen, was immaterial. The only question presented was whether petitioner owned his stock and had the right to have it transferred. The trial court found that he did own the stock and did have the right. As a consequence, respondent was guilty of a conversion in refusing to transfer it; the state of the corporate mind was immaterial.

It is clear from the Texas decisions as well as from the federal decisions that the above principles apply when a corporation is confronted with a request for the transfer of certain stock, and that it may be faced with "technical legal issues" and may be forced to determine those issues correctly in order to escape liability. Public policy will not, under these circumstances as well as under most others, permit ignorance of the law or unsound advice of counsel to be a defense.

In *Rio Grande Cattle Co. v. Burns, Walker & Co.*, 82 Tex. 50, the company was held liable in damages for refusing to transfer stock although its refusal was based upon the belief that a certain written agreement entered into by the original incorporators turned the corporation into a partnership. The court admitted in its opinion that the "agreement under

consideration in many of its features assimilates nearer to a partnership in defining the rights and liabilities of its members than to a corporation." (82 Tex. 55.) The court held, nevertheless, that the agreement did not turn the partnership into a corporation and that the corporation was guilty of conversion. The court evidently considered it immaterial that the demand for the transfer raised a technical legal issue.

In *London, Paris & American Bank v. Aronstein*, 117 Fed. 601 (9th Circuit), cert. den. 187 U. S. 641, the court held a corporation liable in damages for refusing to transfer stock upon demand of an executor. The corporation acted under the belief that the law of England, which required that the decedent's estate be administered upon at the domicile of the corporation in England before a transfer could be made, was controlling. The court held, in four pages of legal reasoning, that certain provisions in the California Constitution overrode the law of England which would have required administration of the decedent's estate in England.

Under the above decisions how can it be said that respondent was justified in refusing to transfer petitioner's stock because petitioner's demand for the transfer, under the circumstances that existed, raised "technical legal issues"? How can it be said, for example, that the pendency of the Massachusetts garnishment proceeding raised a "technical legal issue" which the officers of respondent were not called upon to decide, and that, as a consequence, respondent could refuse to make the transfer? If comparisons are to be made, it took no more legal acumen to correctly decide the "technical legal issues" presented in

the *Rio Grande Cattle Company* case and the *Aronstein* case than it would have taken to correctly decide the legal question presented to respondent by the pending appeal in the garnishment proceeding and petitioner's demand for a transfer of his stock. In fact it took less, because the Texas law clearly is that the entry of a judgment quashing a writ of garnishment and discharging the garnishee places all parties in the position they occupied before the writ was issued, and an appeal from the judgment will not restore the status quo or in any way prevent the parties from acting as though the writ had never issued, unless a supersedeas bond is filed.

The Circuit Court of Appeals' holding comes to this: First, that a corporation can refuse to transfer stock merely because some third party questions the right of the party requesting the transfer; and, second, that a corporation can refuse to transfer stock and be relieved of any liability in conversion if it has the foresight to consult counsel and obtain an opinion supporting its action.

The first proposition is answered by Judge Sanborn in *O'Neil v. Wolcott Mining Co.*, 174 Fed. 527, 534 (8th Circuit), where he holds that, if the mere questioning by a third party of the claimant's right to a transfer could justify a refusal by the corporation, "it would come to this, that anybody giving notice would stop a transfer."

As to the second proposition, if acting on the advice of counsel is a defense to a suit for conversion based upon a corporation's refusal to transfer stock, there would rarely be a case in which liability could be established.

(c) If respondent was doubtful as to what should be done when petitioner called upon it to transfer his stock, it had ample means of protecting itself. It could and should have filed an interpleader proceeding to get the legal questions, if any, determined. If it did not want to file such a proceeding, and if it placed any faith in Davis' claims (the trial court found that it did not), it should have gotten Davis to file some character of suit to test the legal questions, if any, involved. It did not have the right to rely on the bare claims of Davis and the advice of counsel and refuse to transfer the stock unless it was willing to assume liability for its refusal. The leading cases are *O'Neil v. Wolcott Mining Co.*, 174 Fed. 527, 533-534 (8th Circuit); *State ex rel. v. McIver*, 2 S. C. (2 Rich.) 25, 44; and *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 278-279. The holdings of those cases are summed up in 18 C.J.S., Corporations, sec. 435, p. 1051 (cited by the Circuit Court of Appeals) as follows:

" . . . where notice is given of an adverse claim which might be lost or injuriously affected by the transfer, the registration should be delayed until the rights therein can be determined by an investigation, or, if necessary, by a legal proceeding. In such a case, the corporation officers are not required or permitted to assume the functions of a court, and by their decision to forever conclude the rights of the contending claimants, and if resort is not had to the courts within a reasonable time, it becomes their duty to register the stock in the name of the first claimant."

(d) Respondent waived any defense based upon Davis' claim that his notes and pledge of stock were

not supported by an adequate consideration and that the stock sold for an inadequate price at the sale because it did not present those grounds as a reason for its refusal to transfer the stock in its letter to petitioner refusing to make the transfer. In *Tobias v. Wolverine Mining Co.*, 52 Idaho, 576, 585, the court stated:

"All of the reasons for the refusal (the refusal to transfer) must be given to the applicant for transfer, as any reasons not given will be considered waived. A defense not asserted at the time of the refusal to transfer cannot be raised at the trial of an action for such refusal."

To the same effect as the above are *In re Klaus*, 67 Wis. 401, 402-403; *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 280; Christy, *The Transfer of Stock*, page 466.

2. The Circuit Court of Appeals lays stress upon the fact that petitioner bid in the stock at the foreclosure sale for $1.00 per share. It seems to be the idea of the Circuit Court of Appeals that Davis may in some way be prejudiced by the fact that the stock, which the trial court in the instant case found was worth $8.05 per share, sold for $1.00 per share at the foreclosure sale. According to the Circuit Court of Appeals this fact situation "created a legal situation" which the officers of respondent were not called upon to decide. There are a number of answers to this contention.

(a) As pointed out at pages 27-30, *infra*, if the factual situation under discussion "created a legal situation," the duty rested on respondent and its officers to cope with it.

(b) Davis cannot in any way be prejudiced by the price for which the stock sold at the foreclosure sale because the law in Texas is that, where the *pledgee* of stock buys the stock in at the sale, the debtor must be credited with the full value of the stock, irrespective of the selling price. This is the holding in *King v. D. Sullivan & Co.*, 92 S. W. 51, 52-53 (Tex. Civ. App.). Throughout this proceeding petitioner had admitted this to be the law of Texas.

(c) Under the law of Texas petitioner, as the pledgee of stock properly endorsed, had the right to have the stock transferred with or without a sale. *Seeligson & Co. v. Brown*, 61 Tex. 114, 117; *Cavitt v. Gulledge*, 255 S. W. 784, 787 (Tex. Civ. App.); *Davis v. Hardwick*, 94 S. W. 359, 361 (Tex. Civ. App.). Consequently, respondent could not have been concerned, or should not have been concerned, when the demand for transfer was made, with what, if anything, had happened at the foreclosure sale.

(d) The stock pledged to petitioner sold for $1.00 because of Davis' action in chilling the bidding by giving written notice to all prospective bidders that any purchaser of the stock would be buying a lawsuit. (R. 50-51.) It seems self-evident that the Circuit Court of Appeals erred in giving consideration to the selling price of the stock to protect Davis when Davis was responsible for the low price for which the stock sold. It seems too clear for argument that Davis could not complain of the price at which the stock sold, and it is difficult to see why the respondent should be permitted to assert a right that Davis could not assert.

VII.

Conclusion

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such end a writ of certiorari should be granted; and that this Court should review the decision of the Circuit Court of Appeals for the Fifth Circuit and should finally reverse it and affirm the judgment of the trial court.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
MAR 26 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 1014

October Term, 1941

CHARLES B. RAYNER,
Petitioner

v.

UNITED NORTH & SOUTH DEVELOPMENT COMPANY,
Respondent

BRIEF BY RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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SUBJECT INDEX

	Page
Jurisdictional Statement	1
Preliminary Statement	2
Summary	5
The Warning by Davis not to Transfer the Stock	11
Invalidity of the Sale of the Stock	19
The Garnishment Question	21
Other Grounds for Refusal to Transfer	26
Rayner Has Pursued Wrong Remedy	28
Answer to Each Ground Alleged by Petitioner	31
Ground 1 (a)	31
Ground 1 (b)	32
Ground 1 (c)	34
Ground 1 (d)	35
Ground 1 (e)	36
Ground 2 (a)	37
Ground 2 (b)	37
Ground 3 (a)	39
Ground 3 (b)	39
Ground 3 (c)	40
Conclusion	41

INDEX OF AUTHORITIES

	Page
Bayard v. Bank, 52 Pa. St. 235	12, 14
Baxter v. Boston-Pacific Co., 253, Pac. (Cal.) 185	13
Bergman v. Bank, 141, S. W. 154 (Tex. CCA)	23
Citizens Nat'l Bank v. Santa Rita Hotel Co., 22 Fed. (2d) 524	13
Coats v. Guaranty Bank, 129 So. (La.) 513	13

LIST OF AUTHORITIES (Continued)

	Page
Commonwealth of Massachusetts, et al v. Davis (opin. not yet printed)	4
8 Corpus Juris 444	17
8 Corpus Juris 751	18
14 Corpus Juris 759, Sec. 1159	13
19 Corpus Juris Sup. p. 387, Sec. 950	27
19 Corpus Juris Sup. p. 388, Sec. 950	27
Cooper v. Decker, 21 S. W. (2d) 70, (Tex. CCA)	24
Cooper v. Spring Valley Water Co., 177 Cal. 158, 153 Pac. 936	13
Corn Exchange Nat'l Bank v. Kaiser, 160 Wis. 199, 151 N. W. 259	13
Cox v. First Nat'l Bank, 26 S. E. 22 (N. C.)	13
Cox v. Republic National Co., 112 S. W. (2d) 300 (Tex. CCA)	12
Davis v. State, 257 S. W. 1099 (Tex. Ct. of Crim. App.)	23
Dibert v. D'Arcy, 154 S. W. 1115 (Mo.)	20
Geyser-Marion Gold-Mining Co. v. Stark, 106 Fed. 588	13
Hinton v. Uvalde Paving Co., 118 S. W. (2d) 317 (Tex. CCA)	24
Houston Oil Co. v. M. C. Carthy, 245 S. W. 651 (Tex. Comm. App.)	24
Houtchens v. Mercer, 119 Tex. 431	23
Howe v. Roberts, 95 So. 344	31, 40
Humble Oil & Refining Co. v. Andrews, 285 S. W. 894 (Tex. CCA)	23
Hunter v. Lanius, 82 Tex. 677, 18 S. W. 201	17
King v. Sullivan, 92 S. W. 51 (Tex. CCA)	20
King v. Watson, 117 Pac. 165	23

LIST OF AUTHORITIES (Continued)

Page

Leurey v. Bank of Baton Rouge, 131 La. 30, 58 So. 1022 13
Livezey v. N. Pac. Ry. Co., 27 Atl. 379 13
London, Paris and American Bank v. Aranstein, 117 Fed. 601, cest den 187 U.S. p. 641 37
Mackenzie v. Engelhard, 266 U. S. 131, 69 L. Ed. 205 ..... 12, 23
Medical Arts Bldg. Co. v. Southern Finance & Del. Co., (CCA 5th) 29 Fed. (2d) 696 28
Mundt v. Commercial Nat'l Bank, 35 Utah 90, 99 Pac. 454 13
Nagel v. Ham, Yearsley and Ryrie, 152 Pac. 520 13
O'Neil v. Walcott Mining Co., 174 Fed. 527 38
Pecos Ry. Co. v. Porter, 183 S. W. 98 34
People v. Elgin Motor Corp., 208 Ill. App. 601 (Ill. Supt. Ct.) 12
Railway Co. v. Jackson, 85 Tex. 608 24
Ralston v. Bank, 44 Pac. 476 (Cal.) 13
Revised Civil Stat. of Tex. 1925 Art. 4084 ..... 22, 23
Revised Civil Stat. of Tex. 1925 Arts. 279 and 4077 23
Revised Civil Stat. of Tex. 1925 Art. 2270 23
Rich v. Conley, 64 N.Y.S. 33 23
Rio Grande Cattle Co. v. Burns, Walker & Co., 82 S. W. 50 34
Robertson v. L. Nicholes Co. Inc., 253 N. Y. Sup. 76, 141 Misc. 660 28
Shear Co. v. Wilson, 292 S. W. 531 (Tex. Com. App.) 12, 13, 18, 40
Snyder v. Charleston & S. Bridge Co., 65 W. Va. 1, 63 S. E. 616 13

LIST OF AUTHORITIES (Continued)

	Page
Sparenberg v. Nesbitt, 134 Pac. 342 (Dist. Ct. of App. Cal.)	12
Strange v. H. & T. C. R. R. Co., 53 Tex. 162	12
State Bank v. First Nat'l Bank, 228 S. W. 268 (Tex. CCA)	23
In Re S. P. Smith Lumber Co., 132 Fed. 618 (D. C. N. D. of Tex.)	28
Texas Law Review 442	27
33 Tex. Jurisprudence, Sec. 24, p. 710	20
Thompson on Corporations (3rd Ed.) Sec. 4081	27
Thompson on Corporations (3rd Ed.) Sec. 4082	27
Thompson on Corporations (3rd Ed.) Sec. 4344	13
Thompson on Corporations (3rd Ed.) Sec. 4433	13
In Re. Thompson, 276 Fed. 313 (U.S.D.C.) affm. 284 Fed. 65 (CCA) certiorari denied, 260 U.S.	20
Waples-Platter Gro. Co. v. T. & P., 95 Tex. 486	24

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BRIEF BY RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

JURISDICTIONAL STATEMENT

The petition for writ of certiorari does not comply with the rules of this court (Rule 38, paragraph 2), which require a statement particularly disclosing the basis upon which it is contended that this court has jursidiction to review the judgment in question. The required jurisdictional statement is found only in the brief attached to the petition.

PRELIMINARY STATEMENT

At the outset, respondent calls attention to a recent Texas decision handed down since the opinion of the Circuit Court of Appeals in this cause, and submits that that decision is conclusive of the matters involved in this cause.

The record in this case shows that the Commonwealth of Massachusetts filed a suit in the State Court against Edgar B. Davis on a tax judgment secured in Massachusetts and as ancillary to that suit filed a garnishment suit against respondent as garnishee and secured a writ of garnishment against the stock of Davis in respondent corporation; that the garnishment writ was quashed and the Commonwealth of Massachusetts appealed from the judgment quashing the writ with only a cost bond and without a supersedeas bond. An appeal was also taken in the main suit and a supersedeas bond was filed therein. One of several reasons assigned by repondent for refusing to transfer the stock was that the garnishment suit was still pending in the appellate court and respondent was prohibited under the statutes from transferring the stock pending appeal. The trial court in this case was of the opinion that the quashing of the writ left respondent free to transfer the stock since no supersedeas bond was filed by Massachusetts on appeal in the garnishment suit.

During the trial and on appeal of this cause, it was not disputed that if the garnishment writ was

in force and effect at the time of the demand by Rayner for transfer of the stock, the corporation was justified in refusing to transfer it.

At page 30 of his brief filed in this court, in support of his petition for certiorari, petitioner makes the statement that "the Texas law clearly is that the entry of a judgment quashing a writ of garnishment and discharging the garnishee places all parties in the position they occupied before the writ was issued, and an appeal from the judgment will not restore the status quo or in any way prevent the parties from acting as though the writ had never issued, unless a supersedeas bond is filed."

No doubt the above statement by petitioner was written and printed before the recent Texas decision; otherwise, petitioner certainly would not have made such statement, particularly when he does not cite any authorities in support of his view. Although the Circuit Court of Appeals said "a reversal might lead to litigation in which the corporation would be invoked," it is noticeable that petitioner barely mentions the garnishment question in his application and brief, when it cannot be disputed that if the statutes of Texas restrained the corporation from transferring the stock, petitioner would not be able to recover in this action.

On February 18, 1942, after the decision of the Circuit Court of Appeals in this cause, the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, handed down decisions in

both suits. In Cause No. 9041, *Commonwealth of Massachusetts, et al* v. *Edgar B. Davis,* (opinion not yet printed), the court in upholding a judgment for Davis on his cross action for damages for wrongfully suing out the writ of garnishment, specifically held that the garnishment writ was in full force and effect pending the appeal despite the fact that the Commonwealth of Massachusetts had not filed a supersedeas bond. The court said:

> "In the instant case the impounding of the stock by garnishment did deprive appellee of its use, because our statute (Art. 4084) prohibits the sale or *transfer* of stock of a corporation impounded by garnishment, and provides that any sale or *transfer* of the stock is void. This is true even though the officer serving the writ does not in fact take possession of the stock, because the courts hold that under such a statute, the writ is still in force and effect, notwithstanding the writ has been quashed, and notwithstanding an appeal is taken on cost bond from the order quashing it, and *although no supersedeas bond is filed.* Mackenzie v. Englehard, 266 U. S. 1139. By the service of and continuing in force of the writ of garnishment, appellee has been deprived of the use of his stock in financing the development of the property which would have made the stock valuable, and the garnishment caused the stoppage of cessation *of* the development contracted for because those interested feared change in management of the corporation." (Italics ours).

Respondent submits, therefore, that this decision alone is sufficient to justify a denial of the petition

for certiorari. This shows that the Circuit Court of Appeals not only did not decide a question of local law in a way probably in conflict with applicable local decisions, but decided the question in complete harmony with an applicable local appellate court decision on the identical matter involved in this suit, that is, that the garnishment writ was in full force and effect at the time petitioner demanded a transfer of the stock and that the garnishment lien continued in effect pending appeal by virtue of the statute.

Respondent submits that nothing further need be said, but will discuss the issues in order to show the soundness of the judgment of the Circuit Court of Appeal.

SUMMARY

The record shows that for sometime prior to this litigation, Davis was making the contention that there was no consideration for the transfer of the stock by him to Rayner. H. M. Ainsworth, Vice President of the corporation, testified that he had discussed the matter with Davis "hundreds of times, as a guess." (R. 84). Respondent submits that the record clearly shows that Rayner knew that Davis was contending that there was no consideration for the notes before he demanded transfer of the stock. The record also shows (R. 100) that the Commonwealth of Massachusetts had filed a suit against Davis in the State District Court and had run a writ of garnishment on the stock of Davis in the corpora-

tion; that Davis and Rayner and other lien claimants on the stock of Davis were parties to this suit; that the garnishment writ had been quashed but the State of Massachusetts had appealed to the Third Court of Civil Appeals of Texas from both the garnishment suit and the main suit to which the garnishment suit was ancillary; that only an appeal bond was perfected by Massachusetts in the garnishment suit; that after the garnishment writ was quashed, Rayner and other parties claiming a lien on the stock, as well as Davis, agreed to dismiss their suit as to ownership of the stock *without prejudice* to all parties and allow the appeal of Massachusetts to proceed without their being parties. (R. 126). This left unsettled the question of the superiority of the liens claimed by Massachusetts and Rayner.

The record also shows that at the time of the sale of the stock by Rayner to himself at public sale, he was warned by Davis that the sale was invalid. (R. 50).

After the sale of the stock by Rayner to himself and after Rayner had demanded that the corporation transfer the stock to him, Davis, in addition to making oral protests with the corporation against transferring the stock, wrote a letter to the corporation, in which he said in part as follows:

> "I am notifying you and the directors that any transfer of this stock except upon a determination of the question of ownership between said Rayner and myself should only be made in a way that will protect the Company." (R. 87)

The officers of the corporation had no interest in the matter other than to do that which the law required them to do. What should they have done in the face of these facts? They saw that Rayner was claiming that the stock should be transferred to him. They saw that Davis was claiming that there was no consideration for the notes and pledge of the stock by him to Rayner and had warned the company not to transfer the stock. They saw that the Commonwealth of Massachusetts was claiming a lien on the stock by virtue of the writ of garnishment and statute and that the validity of this writ was on appeal. If they should transfer the stock to Rayner they knew that they would be taking a chance of having to reimburse either Davis or the Commonwealth of Massachusetts for the value of the same. Naturally, the officers of the corporation turned to its attorneys for advice which they followed and thereupon wrote a letter to Rayner, as follows:

"UNITED NORTH & SOUTH DEVELOPMENT CO.
LULING, TEXAS
November 8, 1940

Charles B. Rayner, Esq.
Scarbrough Building
Austin, Texas

Dear Mr. Rayner:

This will acknowledge the receipt of your letter of November 1, 1940, received by us on November 2, 1940, with reference to the transfer of certain stock represented by certificates in the name of Mr. Edgar B. Davis.

We have taken this matter up with our attorneys who advise that we are prevented from making any transfer of the stock referred to in your letter for a number of reasons, among which are: there is still pending in the Courts of Texas, a certain suit styled the Commonwealth of Massachusetts versus Edgar B. Davis, in which said stock is involved and tied up; and that stock is subject to the final outcome of the Garnishment suit pending in connection with the above mentioned litigation; further, that the Court of original jurisdiction requires us to hold all stock standing in the name of Edgar B. Davis in status quo until the final termination of both causes.

Mr. Edgar B. Davis has advised us that the purported sale held by you in Austin, Texas, on October 18, 1940, where you claimed to purchase the stock, was entirely invalid; and that you were fully notified of the illegality of such action by due written notice duly delivered to you before you offered said stock for sale.

The Company has been specifically notified by Mr. Davis that you are not entitled to a transfer of said stock, and that he disputes your right to have the same transferred from his name.

You will please understand that this Company does not have the right nor is the duty imposed upon it to determine who owns stock, the title to which is in controversy, offered for transfer on its books.

The Company stands ready to make the transfer to you if you are the true owner but it feels justified in taking the position that it should be furnished with satisfactory evidence of the un-

disputed ownership of any such stock before transfer.

Yours very truly,

H. M. AINSWORTH

Vice-President and Treasurer."

(See R. 59)

We see, then, that the corporation based its refusal to transfer upon the warning by Davis, and specifically mentioned the garnishment appeal and the invalidity of the sale of the stock by Rayner to himself and "a number of reasons," which, under the state of the record, includes the question of lack of consideration for the notes and the pledge of the stock, or as stated in the letter from Ainsworth to Rayner that Davis "disputes your right to have the same transferred from his name."

The trial court in finding that the corporation was not justified in refusing to transfer the stock, based its finding wholly upon—

(1) the fact that Davis owned more than eighty percent of the stock;

The only witness examined on Davis' alleged domination of the corporation—viz., Ainsworth, Vice President, testified positively that Davis did not dominate him. (R. 93).

(2) the fact that the officers of the corporation

in previous garnishment suits had answered that the stock was pledged to Rayner;

> In the words of the Circuit Court of Appeals, "the fact that he (Ainsworth) or other officers of the Company had answered or admitted in garnishment proceedings that the stock was pledged to Rayner did not make them the judges of the validity of such a pledge."

(3) the appeal of the garnishment suit by Massachusetts without a supersedeas bond left the Company free to make the transfer;

> The officials of the corporation were advised by counsel, the good faith of which the trial court did not question (R. 203), that the appeal by Massachusetts against the quashing of the garnishment, even without supersedeas, had the effect of maintaining the lien in force. And the Texas Court of Civil Appeals so held on February 18, 1942.

The Circuit Court of Appeals held that

> "The sole question is as to whether or not the probable cause existed to justify the refusal of the transfer."

It concluded that the circumstances in this case

> "created a legal situation which the officers of defendant were not qualified to decide—they were entitled to rely on the advice counsel gave in good faith."

And that

> "While it (the writ of garnishment) had been quashed by the trial court and appealed without supersedeas, a reversal might lead to litigation in which the corporation would be involved."

And that

> "The officers of the appellant acted upon the advice of reputable counsel, and it cannot be said that they were arbitrary or that the right of plaintiff to have the transfer was free from doubt."

Respondent submits, therefore, that the findings by the trial court were not supported by the evidence and that the Circuit Court of Appeals properly reversed the cause.

THE WARNING BY DAVIS NOT TO TRANSFER THE STOCK

The opinion of the Circut Court of Appeals held, among other things, the following:

> "The sole question is as to whether or not the probable cause existed to justify the refusal of the transfer."

> "The fact that * * * officers of the company had answered or admitted in garnishment proceedings that the stock was pledged to Rayner did not make them the judges of the validity of such a pledge."

"The officers of the appellant acted upon the advice of reputable counsel, and it cannot be said that they were arbitrary or that the right of plaintiff to have the transfer was free from doubt."

"They were entitled to rely on the advice counsel gave in good faith."

The above holdings of the Circuit Court of Appeals are in line with the rulings of all courts, towit, that a corporation, acting in good faith, may always refuse to make a transfer of stock where it has reasonable grounds for so doing, and especially where it has been warned by the holder of record not to make the transfer, and a garnishment writ and judgment quashing same is on appeal. Refusal under such circumstances does not constitute conversion.

AUTHORITIES

Makenzie v. Engelhard, 266 U. S. 131, 69 L. Ed. 205
People v. Elgin Motor Corporation, 208 Ill. App. 601, (Ill. Sup. Ct.)
Cox v. Republic National Company, 112 S. W. (2d) 300 (Tex. C.C.A. writ of error dismissed)
Shear Co. v. Wilson, 292 S. W. 531 (Tex. Com. App.)
Bayard v. Bank, 52 Pa. St. 235
Strange v. H. & T. C. R. R. Co., 53 Texas 162
Spangenberg v. Nesbitt, 134 Pac. 342
(District Court of App. Cal.)

Cox. v. First National Bank, 26 S. E. 22 (N.C.)
Baxter v. Boston-Pacific Co. 253 Pac. (Cal.) 185
Citizens Natl. Bank v. Santa Rita Hotel Co. 22 Fed. (2) 524
Coats v. Guaranty Bank, 129 So. (La.) 513
Ralston v. Bank, 44 Pac. 476 (Cal.)
Mundt v. Commercial National Bank, 35 Utah 90, 99 Pac. 454
Cooper v. Spring Valley Water Co., 177 Cal. 158, 153 Pac. 936
Corn Exchange Nat. Bank v. Kaiser, 160 Wis. 199, 151 N. W. 259
Geyser-Marion Gold-Mining Company v. Stark, 106 Fed. 588
Snyder v. Charleston & S. Bridge Co., 65 W. Va. 1, 63 S. E. 616
Leurey v. Bank of Baton Rouge, 131 La. 30, 58 So. 1022
Nagel v. Ham, Yearsley and Ryrie, 152 Pac. 520
Livezey v. N. Pac. Ry. Co. 27 Atl. 379
Thompson on Corporations (3rd Ed.) Section 4433
14 Corpus Juris, p. 759, Section 1159
Thompson on Corporations (3rd Ed.) Section 4344

In *Shear Co.* v. *Wilson*, 292 S. W. 531 (Tex. Com. App.) the court had under consideration the validity of a transfer of certificates of stock alleged to belong to a Mrs. Wilson but standing in the name of another person after the officers of the corporation had notice of Mrs. Wilson's claim thereto. The transfer was made without Mrs. Wilson's authorization and after notice of her claim of equitable title. The court

in its opinion stated and applied the legal principles involved as follows:

> "Now it cannot be doubted but that, in the absence of notice to the contrary, the corporation in the matter of transferring its shares would be fully justified in acting upon the presentation of such certificate properly endorsed by the record holder of the legal title to the shares represented. Upon the plainest principles of justice, notice that another than the one presenting is the equitable owner of the shares would preclude the corporation from making the reissue upon the penalty of liability as for a conversion upon the real owner's suffering a loss."

> "* * * The contention is that under the well-recognized rules facilitating the use of stock certificates as commercial paper, the corporation was authorized to treat C. W. Wilson, the holder under a blank endorsement of a prior legal owner, as the real owner. This, of course, is true in the absence of notice to the contrary, but presumptions, however wholesome, will not be indulged contrary to the known facts. There is no question of an innocent person's suffering or of estoppel. It is purely a question of the corporation's issuing Mrs. Wilson's stock to another, after notice that it belonged to her."

The court in the above cause cites *Bayard* v. *Bank*, 52 Pa. St. 235, in which case it is stated as follows:

> "That a bank or other corporation, and also

these defendants, are trustees to a certain extent for stockholders—that is, for the protection of individual interests—cannot be denied. They are alike trustees of the property and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation. From this it results that they may rightfully demand evidence of authority to make a transfer before they permit it to be done. Their own safety required that they be satisfied of right of the person proposing to make a transfer to do what he proposes. Generally, sufficient evidence of such right is found in the possession of legal titles to the stock. Yet it is well settled that it is not in all cases sufficient, notwithstanding that the true equitable ownership may be in some other than the holder of the legal right, and the transfer may be a gross wrong to such an equitable owner. To that wrong the corporation or keepers of the register make themselves parties, if, with knowledge that there is no equitable right to transfer, they permit it to be done."

Whether or not there was adequate consideration for the notes given Rayner by Davis is not an issue in this case. "The sole question," as stated by the Circuit Court of Appeals, "is as to whether or not the probable cause existed to justify the refusal of the transfer."

The evidence shows that on a previous occasion Davis had made a gift to Rayner of $100,000.00 even though Rayner did not admit that it was an actual gift. (R. 194-195). The trial court said:

> "It is common rumor all over this country that when Davis sold out his original holdings that he gave money to everybody and everything; but I don't think it has anything to do with this case." (R. 195).

Ainsworth, Vice President, testified:

> "He (Davis) always called it a gift every time he talked to me about it." (R. 84)

and that they had discussed the matter

> "hundreds of times as a guess." (R. 84).

Caylor testified he knew of the controversy between Davis and Rayner. (R. 134).

We call attention to this matter for the reason that the officers of the corporation were in a position to know of the generosity of Mr. Davis, and that when he told them that the notes to Rayner constituted a gift, they had good reason to believe it.

Since Davis was not a party to the suit, the reasons which actuated him in keeping alive evidences of a gift instead of filing suit to attack the validity of the notes and pledge of stock were not gone into, and no conclusion can be drawn therefrom as petitioner attempts to do.

We submit that the Circuit Court of Appeals was correct in pointing out that controversies "as to whether they were donations or had any considera-

tion" "may or may not in a proper proceeding have merit." The Circuit Court of Appeals expressed the view "that the appellee should be relegated to either a mandamus, an injunction, a suit for specific performance or other proceedings, *in which the title to the stock can be determined.*" (Italics ours).

Respondent submits that a reading of petitioners' brief at pages 17 and 18 shows that there was no consideration for the notes given by Davis to Rayner. Petitioner parted with nothing and did not agree to part with anything. The facts stated show on their face that it was simply an act of generosity on the part of Davis, just as it was when there was no liability on the part of Davis to pay Rayner the $100,000.00 he gave him on another occasion. (R. 194-195).

Petitioner's main argument that there was consideration for the notes is based upon the fact that the original notes had been renewed and Davis had acknowledged the debt in several letters. But this was not sufficient consideration to estop Davis from claiming there was no consideration for the notes in the hands of Rayner. This is clearly held in *Hunter* v. *Lanius*, 82 Tex. 677, 18 S. W. 201. The rule is stated in 8 *Corpus Juris* 444 as follows:

> "As between the original parties, and as against transferees who are not bona fide purchasers for value, a renewal note is open to all defenses which might have been made against the original note, at least in so far as they re-

> late to consideration, such as want or failure of consideration, fraud, usury, gambling debts, or other illegality. * * * "

The rule is again stated with reference to a failure of consideration in 8 *Corpus Juris* 751 as follows:

> "Where a note is executed to a payee only in renewal of a prior note given to him, the real consideration for which it is given is that for which the prior note was given, and the failure of the same may be pleaded in an action on the latter note. * * * "

But regardless of the question as to whether the notes were based upon a consideration, the corporation was justified in refusing to transfer the stock as the officers thereof acted in the good faith belief that a bona fide controversy existed between Davis and Rayner as to whether there was any consideration.

We again call attention to the second paragraph of the quotation from the Texas case of *Shear* v. *Wilson*, supra, where the court said:

> "It is purely a question of the corporation's issuing Mrs. Wilson's stock to another, after notice that it belonged to her."

In the case now before this court, not only did the officers who acted for the corporation have a specific warning from Mr. Davis with reference to the controversy between him and Rayner, but the officer who

acted for the company (Colonel Ainsworth) had had an intimate knowledge of the facts of the controversy from many and repeated conversations with the parties involved. This officer also acted on the advice of counsel as to the effect of pending writ of garnishment.

Respondent respectfully submits that the Circuit Court of Appeals was right, and we again quote from its opinion, when it said:

> "The sole question is as to whether or not probable cause existed to justify the refusal of the transfer."

INVALIDITY OF THE SALE OF THE STOCK

One of the reasons specifically assigned by the corporation in its letter to Rayner refusing to transfer the stock was that Davis claimed that the sale of the stock from Rayner to himself was invalid.

The Circuit Court of Appeals in speaking of this matter, says:

> "This created a legal situation which the officers of defendant were not qualified to decide."

Respondent submits that the sale of the stock by Rayner to himself was in fact invalid.

AUTHORITIES

In Re Thompson, 276 Fed. 313 (U.S.D.C.) affirmed, 284 Fed. 65 (CCA) Certiorari denied 260 U.S.
Dibert v. D'Arcy, 154 S. W. 1115 (Mo.)
King v. Sullivan, 92 S. W. 51 (Tex. CCA)
33 Tex. Jurisprudence, Sec. 24, page 710

The stock was sold by Rayner to himself for $1.00 per share (R. 49). He filed this suit a few days thereafter and alleged its value to be $10.00 per share and recovered judgment for the sum of $8.05 per share. One officer of the corporation testified (R. 136) that the stock was worth about $3.50 per share and another officer testified (R. 155) that he estimated the stock to be worth not more than $5.00 per share.

It is thus seen that the officers of the corporation could have easily believed that there was a bona fide question raised by Davis as to whether Rayner had sold the stock for an inadequate consideration. Respondent believes that under the evidence, Davis in a suit brought by him, could set aside the sale for the reason that Rayner in making a sale of the property was acting as a trustee for Davis and it was his duty to procure the best price he could for the stock. It is clear that in making the sale of stock for $1.00 per share he violated his trust and thereby rendered the sale invalid, and, of course, if the sale was invalid, he has no right to recover in this action.

It was only necessary for the officers of the corporation to believe that a bona fide controversy existed between the three parties over this matter and if so, they were justified in refusing to transfer the stock.

Respondent respectfully submits that the Circuit Court of Appeals was right, and we again quote from its opinion with reference to this matter, when it said:

> "This created a legal situation which the officers of the defendant were not qualified to decide."

THE GARNISHMENT QUESTION

Another reason specifically assigned by the corporation in its letter to Rayner refusing to transfer the stock was that it had been advised by its attorneys that it was prohibited from doing so on account of the pendency of the garnishment suit by Massachusetts to garnish the stock of Davis in the corporation.

At the time of the trial and at the time of the decision of the Circuit Court of Appeals there was no Texas decisions exactly in point on this question. As pointed out in our Preliminary Statement herein, the decision of the Court of Civil Appeals for the Third Supreme Judicial District of Texas did not decide this identical question until February 18, 1942. But the Circuit Court of Appeals in this case,

while not directly passing upon the question as to whether the lien of garnishment was in force pending appeal without a supersedeas bond, did agree with respondent that regardless of the law on this question, the uncertainty of the law was a sufficient ground to justify a refusal to transfer the stock. The Circuit Court of Appeals said with reference to the garnishment writ:

> "While it had been quashed by the trial court and appealed without supersedeas, a reversal might lead to litigation in which the corporation would be involved."

Article 4084, *Revised Civil Statutes of Texas*, 1925, provides as follows:

> "EFFECT OF SERVICE OF WRIT.—From and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects; nor shall the garnishee, if an incorporated or joint stock company in which the defendant is alleged to be the owner of shares or to have an interest, permit or recognize any sale or transfer of such shares or interest; and any such payment or delivery, sale or transfer, shall be void and of no effect as to so much of said debt, effect, shares, or interest as may be necessary to satisfy the plaintiff's demand."

It is to be noticed that the Texas Court of Civil Appeals in the recent opinion held that by virtue of the above statute, the garnishment lien of the

Commonwealth of Massachusetts continued during the appeal of the garnishment suit.

Respondent submits that it is clear under the Texas statute that the stock could not be transferred pending appeal. *Revised Civil Statutes of Texas*, 1925 Art. 4084; *Humble Oil & Refining Company* v. *Andrews*, 285 S. W. 894 (Tex. CCA—writ of error refused by Texas Supreme Court). The conditions of attachment and garnishment bonds are identical, *Revised Civil Statutes of Texas*, 1925, Arts 279 and 4077.

The original garnishment bond kept the lien in force pending appeal, *Revised Civil Statutes of Texas*, 1925, Art. 4077.

The garnishment suit should not have been disposed of until the main suit had been determined. *Bergman* v. *Bank*, 141 S. W. 154 (Tex. CCA); *State Bank* v. *First National Bank*, 228 S. W. 268 (Tex. CCA).

The judgment quashing the writ of garnishment was not of such a nature that it could have been superseded. *Revised Civil Statutes of Texas*, 1925, Art. 2270; *Houtchens* v. *Mercer*, 119 Tex. 431; *Davis* v. *State*, 257 S. W. 1099 (Tex. Ct of Crim App); *MacKenzie* v. *Engelhard*, 266 U. S. 131; *King* v. *Watson*, 117 Pac. 165; *Rich* v. *Conley*, 64 N.Y.S. 33.

The effect of the judgment was to take nothing and

since there was nothing to supersede, it would be useless to file a supersedeas bond.

Under the Texas law, an appeal destroys the finality of a judgment. *Ry. Co.* v. *Jackson*, 85 Tex. 608; *Waples-Platter Gro. Co.* v. *T. & P.*, 95 Tex. 486; *Houston Oil Company* v. *McCarthy*, 245 S. W. 651 (Tex. Comm. of App.); *Hinton v. Uvalde Paving Co.*, 118 S. W. (2d) 317 (Tex. CCA—writ of error refused by Supreme Ct.); *Cooper* v. *Decker*, 21 S. W. (2d) 70 (Tex. CCA).

The service of the writ of garnishment in this case immediately created a lien on the shares of stock of Edgar B. Davis in favor of the Commonwealth of Massachusetts. This lien was maintained by virtue of the appeal bond during the pendency of the suit and the judgment by virtue of the appeal, and, as set out by the above authorities from the Supreme Court of Texas, was deprived of its finality. Therefore, the garnishee (respondent herein) could never offer the judgment in bar against a suit by the State of Massachusetts, garnishor, if the United North & South Development Company, garnishee, had transferred the stock to Rayner, petitioner herein, upon his demand during the pendency of the appeal.

Respondent respectfully submits that even before the recent decision by the Texas Court of Civil Appeals, it is clear that under the statutes of Texas providing for a garnishment bond, it was not neces-

sary for the Commonwealth of Massachusetts to file a supersedeas bond on appeal from the judgment quashing the garnishment writ, but that the lien continued in full force and effect pending the final determination of the cause. The recent decision in Texas has definitely settled this point.

Again we are unconcerned as to whether the law actually left the corporation free to transfer the stock. It is clearly shown that even if the contention of respondent is not correct that it was not necessary to supersede the judgment in order for Massachusetts to keep its lien in force, there is at least strong argument for this contention and without question a doubt as to the status of the decisions prior to the recent Texas decision. Therefore, under these circumstances, the officers of the corporation had a right to believe the good faith advice given by its counsel that the garnishment appeal prohibited the transfer of the stock. We again call attention to the doubt in the trial court's mind wherein it was said (R. 202) "I am inclined to think under the Texas statutes and decisions that it could have been superseded." But the trial court did not have the benefit of the recent Texas decision.

We further call attention to the statement of the trial court in its opinion (R. 203) wherein the court stated that he would not attribute bad faith to the attorneys who advised the officers of the corporation.

If the trial court himself had some doubts as to

the law in this matter and would not attribute bad faith to counsel who advised the officers of the corporation, and in view of the fact that there was no definite authority in the State of Texas at that time on this question, respondent respectfully submits that the Circuit Court of Appeals was right, and we again quote from its opinion, when it said:

> "While it (garnishment writ) had been quashed by the trial court and appealed without supersedeas, a reversal might lead to litigation in which the corporation would be involved."

But the recent Texas decision has removed all doubt on the matter.

OTHER GROUNDS FOR REFUSAL TO TRANSFER

In its opinion, the Circuit Court of Appeals said:

> "The effect of the judgment appealed from is to change the status from that of stockholder to a creditor, with the right to participate with other creditors in event of the liquidation or insolvency of the corporation. This should not be done except in a very clear case."

In this connection, we call attention to the fact that the record clearly shows that the corporation had no surplus funds (R. 135-136-153). See especially plaintiff's Exhibit No. 28. (R. 184-186). An

analysis of all these figures showed that the corporation lacked more than $67,000.00 to meet its current liabilities for wages, taxes, and other current requirements. If the judgment of the trial court had been sustained, its effect would have required the United North & South Development Company to purchase 11,709 shares of its stock, and be required to pay therefor the sum of $94,257.45 and to change the position of Rayner from that of a stockholder to a creditor.

It is the general rule that a corporation cannot purchase or acquire its own stock unless the acquisition is in good faith and the rights of the stockholders and creditors are not impaired. 19 *C.J.S.* p. 387, Sec. 950. *Thompson on Corporations* (3rd Ed.) Sec. 4081.

There is a minority rule that goes further and holds that generally a corporation has no power to purchase shares of its own stock. 19 *C.J.S.* p. 388, Sec. 950; *Thompson on Corporations*, (3rd Ed.) Sec. 4082; 13 *Texas Law Review* 442.

The cases in Texas are agreed that Texas corporations cannot purchase or acquire their own stock if there is prejudice to the rights of creditors or other stockholders.

When boiled down, the above rules really mean that a corporation cannot purchase its own stock, except out of its surplus funds. For it to do otherwise

would prejudice the rights of creditors and other stockholders.

Robertson v. L. Nicholes Company, Inc., 253 N. Y. Sup. 76, 141 Misc. 660
In Re S. P. Smith Lumber Co., 132 Fed. 618 (D. C. N. D. Texas).
Medical Arts Building Co. v. Southern Finance & Development Co. (C.C.A. 5th), 29 Fed. (2d) 696.

Respondent submits that the Circuit Court of Appeals was right, and we again quote from its opinion, when it said:

> "The effect of the judgment appealed from is to change the status from that of stockholder to a creditor, with the right to participate with other creditors in event of the liquidation or insolvency of the corporation. This should not be done except in a very clear case."

RAYNER HAS PURSUED WRONG REMEDY

The Circuit Court of Appeals concluded its opinion with the following statement:

> "It is our view that the appellee should be relegated to either a mandamus, an injunction, a suit for specific performance or other proceeding, in which the title to the stock can be determined."

To deny Mr. Rayner's recovery for conversion

would not do him the slightest injustice. If the sale is valid, then he has a right to bring suit against the corporation to compel it to make the transfer and to make Mr. Davis a party to the suit. If he does not make Mr. Davis a party to the suit, then in such suit the company itself would have a right to bring him in so that they might set up their claims and have their rights adjudicated in the same suit and thereby protect itself against their claims. But Mr. Rayner, within a period of approximately one month after the company refused to transfer the stock, brought a suit in the United States District Court instead of bringing a suit against Mr. Davis or a suit for mandamus against the corporation. The corporation could not implead Mr. Davis in this suit, because both he and Rayner were citizens of the State of Texas and to implead Mr. Davis in such suit would destroy the jurisdiction of the court. But independently of that question, this was a suit for conversion and Davis could not be made a party to it because if the company was not guilty of conversion, there could be no recovery against it, and if it was guilty of conversion, it could have no recovery over against Davis, and Davis could not be made a party to the suit. However, Mr. Rayner could have brought a suit in the State court for mandamus to compel the company to transfer the stock and could have impleaded Mr. Davis, or the company could have impleaded Mr. Davis. Mr. Raynor was also, at one time, a party to the garnishment suit, as well as Mr. Davis, but by agreement of those parties, all relief sought in the garnishment

suit as between the parties, other than Massachusetts and United North & South Development Company, was dismissed without prejudice to the rights of the parties to determine this matter in future proceedings. (R. 126).

It seems to us, therefore, that every sentiment of right and justice would require that Mr. Raynor be denied recovery for conversion. He failed to bring the suit that he should have brought in the first instance, and if he is now entitled to recover, he will in effect become a secured creditor of the corporation. We submit that it was the duty of the company, under the circumstances, since it believed in good faith that it would act at its peril in transferring its stock to refuse the transfer until the adverse claims could be determined; that it acted in the utmost good faith by seeking the advice of counsel; that the advice it received from counsel was correct and made in good faith, and as found by the court not to be in bad faith. However, regardless of the correctness of the advice of counsel, if the corporation acted in good faith in believing that a bona fide controversy existed as to whether the notes and transfer of stock to Rayner by Davis was merely a promissory gift, the officers of the corporation would have been derelict in their duty if they had transferred the stock and would have been grossly negligent if they had done so in the face of the advice of counsel that they were not authorized to do so. What greater evidence of good faith could be shown?

It is stated in *Howe* v. *Roberts*, 95 So. 344, by the Alabama Supreme Court, that a "suit in equity is the surest, most complete and most just remedy for compelling a corporation to register a transfer of stock and for adjusting the various conflicting rights or claims of other parties. It is a remedy applicable to almost all cases arising under a refusal of the corporation to allow a registry of transfers."

Respondent respectfully submits that the Circuit Court of Appeals was right, and we again quote from its opinion, when it held:

> "It is our view that the appellee should be relegated to either a mandamus, an injunction, suit for specific performance or other proceeding, in which the title to the stock can be determined."

ANSWER TO EACH GROUND ALLEGED BY PETITIONER

With the above facts and authorities in mind, we will now briefly reply separately to each ground stated by petitioner in his petition for writ of certiorari.

GROUND 1 (a) (Page 5 of Petition)

Petitioner contends that the Circuit Court of Appeals refused to follow the law of Texas in holding that the refusal of a corporation to transfer stock

properly endorsed for transfer gives the party seeking the transfer an option to sue for conversion or to bring a suit for mandamus.

The stock even if "properly endorsed" was subject to a *conditional* assignment, of which the corporation had ample notice and which petitioner held, and further the "proper endorsement" of stock did not release it from the writ of garnishment. The mere request to transfer stock "properly endorsed" could not nullify this legal impediment.

Petitioner cites three Texas cases in all of which the Court found that the refusal to transfer was without adequate cause. The Circuit Court in the instant case held that the refusal to transfer was for several good and adequate reasons. Obviously, the instant case is distinguished from each of the three cases cited. No Texas case has held that a refusal to transfer on the ground that a good faith controversy exists between the parties with reference to the ownership of the stock constitutes a conversion of the stock giving rise to an action for damages.

GROUND 1 (b) (Page 6 of Petition)

Petitioner contends under the above ground that "under Texas decisions, the good faith of the defendant is no defense in an action for damages for conversion where only actual damages are sought."

This statement of the petitioner is based on the presumption that there was actual conversion, whereas conversion arises only where a corporation refuses to transfer without some bona fide reason or justifiable cause.

Good Faith was not the only defense offered by respondent for its refusal to transfer the stock but was relied on separately and in connection with several defenses, i.e.: 1. That there were three claimants to the stock—the State of Massachusetts under a statutory garnishment writ and lien, the petitioner, and Edgar B. Davis, the record owner of the stock. 2. The garnishment was then on appeal which the Texas Court of Appeals recently has held was valid and sufficient to maintain the garnishment and the statutory lien in full force. 3. Respondent had been notified by Edgar B. Davis in writing and verbally that he claimed the stock and not to transfer same to Petitioner. 4. Reputable attorneys had advised the corporation on reasonable grounds that it should not transfer the stock, but to do so only when someone presented good evidence of clear title. The holding of the Circuit Court of Appeals is that there was a "good faith" controversy between the petitioner Rayner and Edgar B. Davis, which alleged controversy was as to the title to the stock at the time it was presented for transfer. Under the decisions, both in Texas and elsewhere, the corporation did not have to sit as a court to try this controversy.

Petitioner cites the case of *Pecos Ry. Co.* v. *Porter*, 183 S. W. 98. This was a suit brought against the railroad for refusal to deliver a carload of household furniture on tender of less than the full amount of freight. In that case it was held that the good faith of the railroad in refusing to deliver the furniture did not affect the plaintiff's right to actual damages for the conversion of the furniture to which he had the undisputed title. That case did not involve a situation where one party had adverse title to the property and where there were two other claimants one of which was asserting a statutory lien against it.

GROUND 1 (c) (Page 6 of Petition)

Under this ground petitioner contends that under Texas decisions a corporation may be called upon to decide "technical legal issues" or run the risk of being held for conversion of stock for refusal to transfer. This is clearly *not* the law in Texas.

The only case cited by appellant to sustain this theory of the law which is not sustained by decisions of either Texas or any other state, is *Rio Grande Cattle Co.* v. *Burns, Walker & Co.*, 82 S. W. 50, which merely holds that where the grounds on which the transfer is refused do not show any controversy over the title to the stock or relate to any such controversy, that the refusal is groundless and therefore constitutes a conversion. Here again pe-

titioner assumes that the Circuit Court of Appeals held that the refusal was groundless when in fact the Court held the opposite.

The points on which respondent refused to transfer the stock were not only "technical legal issues" but they are sound common sense reasons, which the Circuit Court of Appeals held justified the refusal to transfer the stock. No decision is presented where any corporation has been held liable because it failed to decide the outcome of a writ of garnishment or attachment pending in a court of competent jurisdiction at the very time request for transfer was made. The Petitioner had been a party to that very suit.

GROUND 1 (d) (Page 7 of Petition)

Under this ground petitioner contends that "under Texas decisions the corporate fiction will be disregarded where necessary to prevent fraud," and he relies solely upon the fact that because Davis owned a majority of the stock he dominated the officials of the corporation.

The only witness examined at the trial (viz., Ainsworth, Vice President) on the question of Davis' domination of the corporate officials testified that Davis 'did not tell him what to do'. (R. 93).

The Circuit Court of Appeals on sufficient

grounds found that Respondent was justified in refusing to transfer the stock, thus eliminating the question of fraud. There was no evidence of fraud. The mere fact that Edgar B. Davis owned more than fifty per cent of the stock in the corporation does not show domination or fraud. There being no evidence of fraud, it was unnecessary to "disregard the corporate fiction". That is immaterial in this case.

GROUND 1 (e) (Page 8 of Petition)

Under this ground Petitioner contends that "under Texas decisions petitioner, a pledgee of stock properly endorsed for transfer, had the right to have the same transferred on the books of respondent corporation, irrespective of whether or not there had been a foreclosure of the pledge lien."

Petitioner evidently did not believe that the endorsement of the stock was sufficient grounds on which to demand transfer because he undertook to foreclose under the purported assignment which he held, and this Respondent contends that that very foreclosure was invalid and Davis so advised the corporation. Petitioner admits the existence of a conditional assignment and made an attempt to foreclose under it. The question of consideration for the pledge is yet an undecided issue in the case and the Circuit Court of Appeals so said.

GROUND 2 (a) (Page 9 of Petition)

Under this ground petitioner contends that a "corporation must decide the technical legal issue and must decide it correctly," and cites the case of *London, Paris and American Bank* v. *Aranstein*, 117 Fed. 601, cest den 187 U. S. p. 641.

In that case the "technical legal issue" was not involved in suits actually pending in the courts at the time of the request for transfer, while in the instant case title to the stock was tied up in the garnishment suit then pending in the Texas Court of Civil Appeals, which has just recently decided the question as contended for by Respondent. Moreover, in the instant case the party demanding transfer had been a party to that pending suit, though dismissed without prejudice.

Furthermore, any decision by the corporation on this legal point, in the words of the Circuit Court of Appeals, "might lead to litigation in which the corporation would be involved" owing to the several claimants to the stock.

GROUND 2 (b) (Page 9 of Petition)

Under this ground petitioner contends that a corporation, if confronted with conflicting claims to stock and a demand for its transfer, should initiate some type of suit to determine title to the stock.

The case of *O'Neil* v. *Walcott Mining Company*, 174 Fed. 527 cited by petitioner, shows that a corporation "cannot assume the functions of a court and by their determination conclude the rights of the parties." The garnishment matter was already involved and then pending in a court of competent jurisdiction in which case petitioner had filed an interpleader and was awaiting the final decision. Of course this respondent could not assume functions of a court and oust the Texas Court of Civil Appeals of its jurisdiction.

In answer to the quotation out of the above case cited by petitioner that

> "the corporation when it refuses, and upon trial of the issue the court must be able to see from the facts established that *there was some question to be tried.* The mere claim of stock is not sufficient." (Italics ours).

we point out that the garnishment was then pending and therefore there was a "question to be tried" and it was at that very time being tried. The mere claim of *petitioner*, to employ the language of the decision cited, was not sufficient. The petitioner did not file any suit of any character to clarify the situation, and respondent contends that two suits involving the title to the stock had already been filed and were pending — Massachusetts v. Davis and the ancillary garnishment suit, Massachusetts v. United North and South Development Company (this respondent), to which petitioner had been a

party dismissed without prejudice. Respondent could not have maintained another suit to try out an issue already before the courts.

GROUND 3 (a) (Page 10 of Petition)

Under this ground petitioner contends that "the general rule is that a corporation, if confronted with conflicting claims to certain stock and a demand for its transfer, must either file an interpleader suit to get the question decided, get the adverse claimant to file some character of suit that will get the question decided, or transfer the stock to the first claimant."

This contention of petitioner is answered under Ground 2 (b).

GROUND 3 (b) (Page 11 of Petition)

Under this ground petitioner contends that "the general rule is that a corporation refusing to transfer stock must notify the party seeking the transfer of the reasons for its refusal, and that any reason not assigned at that time is waived and cannot be set up thereafter."

The corporation did notify petitioner of its reasons for not transferring the stock by letter and verbally, and certainly if any one was waived all of the reasons given by the letter to petitioner Ains-

worth, and shown by testimony as having been conveyed to petitioner, were not waived; but all of them were set forth by the written evidence and oral testimony in this case. The letter to Rayner stated there were "a number of reasons" and Rayner knew the other reasons, as well as those specifically set out.

GROUND 3 (c) (Page 11 of Petition)

Under this ground petitioner contends that "the authorities cited by the Circuit Court of Appeals do not sustain its decision."

The case of *Shear Co.* v. *Wilson*, 292 S. W. 531 (Tex. Comm. of App.) a case cited by the Circuit Court of Appeals, correctly holds that where a corporation issues stock of one person to another person who fails to show title to the stock, it is responsible. We contend petitioner did not show title to the stock presented by him for transfer, and if respondent had transferred same, it would have been liable.

In reference to *Howe* v. *Roberts*, 209 Ala. 80, cited by the Circuit Court of Appeals, respondent contends that since the Texas Court of Civil Appeals has decided that the garnishment lien continued in effect pending appeal, there is no longer any doubt that Rayner is limited to some other suit to secure a transfer of the stock. If he should be successful in showing clear title to the stock, he will

not be damaged in any way, especially since the stock advanced in value from $1.00 per share at the time petitioner purchased it under his purported foreclosure in October, 1940 to $10.00 per share testified to by petitioner as being the true value at the trial of this cause in June, 1941.

CONCLUSION

This suit is a suit for conversion. When a corporation refuses to transfer stock for justifiable reasons, it is not guilty of conversion. The sole question to be decided in this case is, to use the language of the Circuit Court of Appeals,

> "whether or not the probable cause existed to justify the refusal of the transfer."

The corporation's position was that the stock offered for transfer was involved in a controversy to which Davis, Rayner, and the Commonwealth of Massachusetts were all parties, and that suits were then pending in courts of competent jurisdiction in which title to the stock was an issue. The corporation officials had long known that controversies existed between Davis and Rayner and others as to whether the notes were a gift, and their attitude toward transfer of the stock to Rayner was influenced by knowledge that controversies actually existed, rather than whether the controversies had merit—question not properly before the court since Davis was not a party. These claims, including the

claim that the sale of the stock to Rayner was invalid, "created a legal situation which the officers of defendant were not qualified to decide"—in the words of the Circuit Court of Appeals, and on this matter "the officers of the appellant acted upon the advice of reputable counsel, and it cannot be said that they were arbitrary or that the right of plaintiff to have the transfer was free from doubt"—again quoting the Circuit Court of Appeals.

The position of the corporation officials was that appeal from the quashing of the garnishment on appeal bond, continued the writ in force and effect, and in this position they have been upheld by the recent decision of the Texas Court of Civil Appeals. Moreover, the Circuit Court of Appeals pointed out that "a reversal might lead to litigation in which the corporation would be involved."

Respondent therefore respectfully submits that the petition for certiorari should be denied for the following reasons:

(1) The corporation did not convert the stock, because "probable cause existed to justify refusal of the transfer" due to a long-existing controversy as to whether stock was a gift, the alleged invalidity of the sale of the stock by Rayner to himself, and the pendency of the garnishment suit prohibiting the transfer;

(2) A judgment in favor of petitioner would in

effect change the status of Rayner from a stockholder to a creditor.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
MAR 30 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1014

CHARLES B. RAYNER, *Petitioner*

vs.

UNITED NORTH & SOUTH DEVELOPMENT COMPANY

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	Pages
The appeal in the garnishment proceeding did not prevent respondent from transferring petitioner's stock because the agreed judgment entered in that proceeding specifically provided that the stock pledged to petitioner by Davis and petitioner's rights to such stock were released from, and not affected by, and should not thereafter be affected by, the garnishment proceeding	2-4
If petitioner's stock was not released from the garnishment by the agreed judgment, nevertheless, as the writ of garnishment was quashed and as the status quo was not maintained by the filing of a supersedeas bond, the appeal by the Commonwealth of Massachusetts from that part of the judgment quashing the writ did not keep the stock impounded under the writ and warrant respondent in refusing to make the transfer	5-18
It is no defense to petitioner's action for damages for respondent's conversion of his stock that respondent, if held liable for the conversion, will thereby acquire title to the stock because (1) respondent did not plead any such defense, and (2) the law of Texas permits a corporation to purchase its own stock	18-20

AUTHORITIES

Texas Statutes: Pages

Article 303, Revised Civil Statutes of Texas, 1925 15
Article 2249, Revised Civil Statutes of Texas, 1925 5
Articles 2265-2268, Revised Civil Statutes of Texas, 1925 5
Article 2270, Revised Civil Statutes of Texas, 1925 ..... 5, 12-13
Article 2275, Revised Civil Statutes of Texas, 1925 5
Article 4084, Revised Civil Statutes of Texas, 1925 ..... 5-6, 11

Cases Cited:

Blum v. Addington, 9 S. W. 82 (Sup. Ct.), not reported in official reports 8-10
Bryan v. Luhning, 106 S. W. (2d) 403 (Tex. Civ. App.) 13
Commonwealth of Massachusetts v. Edgar B. Davis (Tex. Civ. App.), opinion not yet reported 15-16
Federal Rubber Co. v. Pruett, 55 Ariz. 390 7-8
G. C. & S. F. Ry. Co. v. F. W. & N. O. Ry Co., 68 Tex. 98 14
Hot Springs Concrete Co. v. Rosamond, 180 Ark. 690 8
Houtchens v. Mercer, 119 Tex. 431 13
Humble Oil & Refining Co. v. Andrews, 285 S. W. 894 (Tex. Civ. App.), writ refused 14-15
Kildare Lumber Co. v. Atlanta Bank, 91 Tex. 95 10
Lee v. Broocks, 111 S. W. 778 (Tex. Civ. App.), writ refused 14
Loveland v. Alvord C. Q. M. Co., 76 Cal. 562 8
Mackenzie v. Englehard Co., 266 U. S. 131 16-17
Maxwell v. Bank of New Richmond, 101 Wis. 286 6-7
Murray v. Humphrey, 132 S. W. (2d) 444 (Tex. Civ. App.) 14
Noyes & Fish v. Brown, 75 Tex. 458 10-11
Roberts v. Stoneham, 31 S. W. (2d) 856 (Tex. Civ. App.) 18
Rowan v. Texas Orchard Development Co., 181 S. W. 871 (Tex. Civ. App.), writ refused 20
San Antonio Hardware Co. v. Sanger, 151 S. W. 1104 (Tex. Civ. App.), writ refused 19-20
Stephens v. Willis, 21 Ky. Law Rep. 170 8
Willis v. Keator, 181 S. W. 556 (Tex. Civ. App.) 11-12

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MAY IT PLEASE THE COURT:

Respondent makes the point in its "Brief in Opposition to Petition for Certiorari" that the taking of an appeal on a cost bond by the Commonwealth of Massachusetts in the garnishment proceeding kept its garnishment writ alive, and that as a consequence respondent could not transfer petitioner's stock.

There are two reasons why respondent's contentions with respect to the garnishment proceeding are untenable.

Petitioner and respondent were parties to the garnishment proceeding, and the agreed judgment entered in that proceeding specifically provided that the stock pledged to petitioner by Davis and petitioner's rights to such stock were released from, and not affected by, and should not thereafter be affected by, the garnishment proceeding.

On February 10, 1940, pursuant to a hearing on October 24, 1939, judgment was entered quashing the writ of garnishment issued on behalf of the Commonwealth of Massachusetts in the garnishment proceeding brought by it against respondent to impound Davis' stock in respondent. The judgment also discharged the garnishee. (R. 120-123.) That judgment further provided:

"Thereupon came on for disposition the answers and interventions of J. E. Mowinckle, Magnolia Petroleum Company, W. F. Peale, Mrs. S. H. Rabon, Dr. J. W. Nixon, *C. B. Rayner*, Central Power & Light Company, Home National Bank of Brockton, Massachusetts and Brockton National Bank, of Brockton, Massachusetts, cross defendants impleaded herein by the United North & South Development Company, garnishee, and who have appeared and filed answers and interventions herein, and all of said cross defendants and interveners announced in open Court that in view of the fact that the garnishment had been quashed, they did not desire to further prosecute any of such interventions and answers and asked that all such interventions and answers filed herein and the causes of action therein asserted be dismissed without prejudice to any rights they may have against either the intervener, Edgar B. Davis, or the plaintiff, Commonwealth of Massachusetts or the garnishee United

North & South Development Company; to which the Commonwealth of Massachusetts, the United North & South Development Company, a corporation, and Edgar B. Davis, by their respective counsel, and all of the other parties to this action, by their respective counsel, in open Court agreed.

"It is, accordingly, Ordered, Adjudged and Decreed that all of said interventions and answers of the said interveners and cross defendants herein and the causes of action therein asserted be, and they are hereby, dismissed, but this dismissal is without prejudice to any rights or claim any of said interveners and cross defendants have against intervener, Edgar B. Davis, or the plaintiff, Commonwealth of Massachusetts or the garnishee United North & South Development Company, and shall not constitute an adjudication thereof, and shall be, and is, without prejudice to their asserted claims of the superiority of their assignments of shares of stock to any claim of the Commonwealth of Massachusetts against the stock attempted to be garnished, and this judgment shall not constitute an adjudication of such matters, *and all of such interveners and cross defendants shall have and retain the full right to assert any rights or claim they may have in any future proceeding.*" (R. 121-122.)

An appeal was taken only from so much of the above judgment as quashed the writ of garnishment; no appeal was taken from that part of the judgment entered by agreement and quoted above. (R. 124-127.)

A reading of that part of the judgment set out above will demonstrate that the purpose of the *agreed* judgment was to take petitioner and other parties similarly situated entirely from the purview of the garnishment proceeding. The judgment dismissed petitioner and the other parties, and pro-

vided that they should "have and retain the full right *to assert any rights or claim they may have in any future proceeding.*"

Petitioner is now prosecuting his "rights" to the pledged stock in a "future proceeding." It seems clear from the judgment that petitioner was placed by the judgment in the same position he would have occupied had no writ of garnishment ever been issued on behalf of the Commonwealth of Massachusetts. The trial court so found and held. (R. 209.)

When the writ of garnishment was issued, petitioner was, of course, interested in asserting the superiority of his claim to the stock pledged to him by Davis over the claim asserted by the Commonwealth of Massachusetts. Being impleaded in the case by the answer of the garnishee which showed petitioner's rights to be superior (R. 104-106, 115), petitioner asserted the superiority of his rights (R. 171-174). If petitioner had insisted upon it, he could in that litigation have secured an adjudication of his rights and could have gotten a judgment establishing the superiority of his rights to the pledged stock over that of the Commonwealth of Massachusetts. As the writ of garnishment was quashed, all parties to the suit realized that it would be a waste of time to litigate the questions involved insofar as the impleaded pledgees (including petitioner) were concerned; and, consequently, all parties reached the conclusion that it would be better for the pledgees, including petitioner, to be dismissed entirely from the garnishment proceeding, with the understanding that they would not be prejudiced by the proceeding in asserting their rights to their collateral *at any place and at any time.*

If petitioner's stock was not released from the garnishment by the agreed judgment, nevertheless, as the writ of garnishment was quashed and as the status quo was not maintained by the filing of a supersedeas bond, the appeal by the Commonwealth of Massachusetts from that part of the judgment quashing the writ did not keep the stock impounded under the writ and warrant respondent in refusing to make the transfer.

The only statutes bearing upon this question are Articles 2249, 2265-2268, 2270, 2275, Revised Civil Statutes of Texas, 1925, which have to do with appeals from, and the supersedeas of, trial court judgments in civil cases, and Article 4084, Revised Civil Statutes of Texas, 1925, which is the only pertinent statute having to do with garnishment proceedings.

Article 2249 provides for an appeal in every civil case. Article 2265 provides for a cost bond on appeal. Article 2266 provides for an appeal on pauper's oath. Article 2267 provides for suing out a writ of error (now abandoned).

Article 2268 provides that an appeal taken under the three preceding articles does not suspend execution of the judgment. Article 2270 provides for suspending the execution of a judgment on giving a supersedeas bond. Article 2275 provides that, if a supersedeas bond is given, execution of the judgment shall be stayed.

Article 4084 provides in part as follows:

"*From and after the service of such writ of garnishment, it shall not be lawful for the* garnishee to pay to the defendant any debt or to deliver to him

any effects; nor shall the garnishee, if an *incorporated or joint stock company in which the defendant is alleged to be the owner of shares or to have an interest, permit or recognize any sale or transfer of such shares or interest;* and any such payment or delivery, sale or transfer, shall be void and of no effect as to so much of said debt, effects, shares, or interest as may be necessary to satisfy the plaintiff's demand."

The above language is not limited as to time, and on the face of it would forever prevent a corporation from transferring any shares after a writ of garnishment had been run. It is clear, however, that the statute, properly interpreted, only prevents such a transfer *so long as the writ of garnishment is in full force and effect.*

The general rule in this and other jurisdictions is that, where a writ of garnishment is issued and then quashed, the mere taking of an appeal from the judgment quashing the writ without supersedeas does not in any way keep the writ in force, and the garnishee is under the legal duty to act, in so far as third parties are concerned, as it would be required to act if no writ of garnishment had been run.

The leading case is *Maxwell v. Bank of New Richmond*, 101 Wis. 286. The facts were these: Maxwell had run a writ of garnishment on one Simonton to reach funds belonging to the bank. The writ had been quashed and Maxwell had appealed therefrom without filing a supersedeas bond. Pending the appeal Simonton gave the funds to the bank, the owner thereof. The appeal was successful and the trial court's action in quashing the writ was reversed. Maxwell thereupon sued the bank for the funds

turned over to it by Simonton, the garnishee, Maxwell's theory being that the transfer of the funds pending the appeal was wrongful.

In holding that the defendant bank was not liable and that the transfer of the funds from Simonton to the bank was rightful the court said:

"The equitable lien in the garnishee proceedings not being continued in any way pending the appeal, or the judgment appealed from stayed, or the garnishee restrained from executing such judgment, it protected the garnishee defendant as to anything he did pursuant thereto before it was reversed.

* * *

"There can be no question but that the appeal from the judgment in favor of the garnishee did not operate as a supersedeas or stay of proceedings under such judgment, or restrain in any way the conduct of the garnishee defendant concerning the property of the principal defendant in his hands. Therefore, the reversal of the judgment on appeal did not revive the equitable lien upon such property. The whole scheme of the code evinces clearly the intent that there shall be no stay in the execution of a judgment carried to this court for review, except by a special order to that effect or the giving of a bond to protect the respondent, or both, according to statutory requirements. Contrary to the old practice, it is expressly provided that the mere suing out of a writ of error and the giving of a bond to make it effectual, shall not operate as a supersedeas: Stats. 1898, sec. 3045." (101 Wis. 288, 289.)

The general rule is very clearly laid down in *Federal Rubber Co. v. Pruett*, 55 Ariz. 390. In that case the court stated:

"The question has arisen in many states under attachment and garnishment statutes as to whether when the trial court quashes a writ of attachment or garnishment, the garnishee or the defendant may dispose of the property seized by the attachment or shown on the return to the writ of garnishment, without liability therefor, if no supersedeas bond is filed on appeal, notwithstanding that judgment on appeal may eventually be rendered against the defendant in the action, and it is very generally held that under such circumstances the liability on the writs is discharged. Maxwell v. Bank of New Richmond, 101 Wis. 286, 77 N. W. 149, 70 Am. St. Rep. 926; Stephens v. Willis, 51 S. W. 9, 21 Ky. Law Rep. 170; Hey v. Harding, 78 S. W. 136, 25 Ky. Law Rep. 1454; Koenig v. Curran's Restaurant, etc., Co., 121 Pa. Super. 201, 183 A. 451." (55 Ariz. 395-396.)

Other cases to the same effect as the cases above are: *Hot Springs Concrete Co. v. Rosamond*, 180 Ark. 690; *Stephens v. Willis*, 21 Ky. Law Rep. 170; *Loveland v. Alvord C. Q. M. Co.*, 76 Cal. 562. The last case involved an attachment proceeding, but the principles laid down are equally applicable to a garnishment proceeding.

The Texas courts follow the general rule referred to above. In *Blum v. Addington* (Sup. Ct.), 9 S. W. 82 (not reported in official reports), the Blums brought suit against the Brackneys and sued out a writ of attachment which was levied upon a stock of goods as the property of the Brackneys. Addington, as claimant of the goods, made oath and gave bond under the statute for the trial of the right of property. When this proceeding was called for trial Addington pleaded that upon motion of the defend-

ant in the original suit the writ of attachment had been quashed and the property released from the levy. Thereupon the Blums moved the court to suspend the proceedings and continue the case until a final judgment could be rendered in the first suit and until a ruling of the Supreme Court could be had upon the question of the validity of the attachment. The court refused to do this and rendered judgment for Addington.

The Supreme Court held:

"We think there was no error in the rulings and judgment of the court. Article 182 of the Revised Statutes provides that 'should the attachment be quashed or otherwise vacated, or should the judgment be for the defendant, the court shall make the necessary order restoring the property to the defendant, or discharging the claim or replevy bond, as the case may be.' It was the duty of the court, when the attachment in the original suit was quashed, to have entered an order discharging the bond of the appellee; but, if this were not done, the omission cannot affect his rights,—he not being a party to the suit in which that judgment was rendered. The legal effect must be the same. *The attachment being quashed, the jurisdiction over the property obtained by it is taken away;* and hence the plaintiff is left without any standing in the proceeding for the trial of the right of property. It would be futile to proceed to trial to determine the question whether or not the property is subject to a writ after the writ has been adjudged void in the suit in which it issued. *We find no authority in the statute for suspending and continuing the proceeding until the validity of the attachment may be determined upon appeal. When an attachment is dissolved by an interlocutory order, the dissolution, with all its consequences, takes effect at once, and, as to personal*

property, puts the parties in the same position as if no attachment had issued. It is true that, if the writ be erroneously quashed, the rule may work a hardship upon the plaintiff therein. The reversal of the judgment can afford him no redress. But this is a matter for the legislature, and it seems to us their intent is apparent. *Attachments are harsh remedies at best; the directions of the statute for obtaining them are very plainly laid down; and it may have been considered that an attaching creditor should not complain if, by reason of some failure to comply with the strict letter of the law, his writ was quashed, though erroneously, and he lost the benefit of his seizure.*" (9 S. W. 83.)

Thereafter our attachment statute was amended, and in *Kildare Lumber Company v. Atlanta Bank*, 91 Tex. 95, the Supreme Court stated:

"Before the amendment, when an attachment was erroneously dissolved, the property was immediately surrendered to the defendant, and although the plaintiff had a right of appeal upon the final disposition of the cause, the appeal, as to that matter, was without any beneficial result. The purpose and scope of the amendment was to correct this evil, and to give the plaintiff an efficacious remedy for the correction of the error, by requiring that the status of the property or fund should be preserved, or that the defendant, before taking possession, should give a replevy bond." (91 Tex. 104.)

The above cases demonstrate this: Before respondent's contention can be upheld respondent must point to some statute that kept the garnishment lien in effect after the trial court quashed the writ of garnishment issued the Commonwealth of Massachusetts. As has been stated, "the proceeding by

garnishment is purely statutory and is not known to the common law, it cannot be pushed in its operation beyond the statutory authority under which it is resorted to." *(Noyes & Fish v. Brown*, 75 Tex. 458, 461.)

Article 4084, *supra*, makes no provision for keeping the garnishment lien alive pending appeal. None of the other statutes governing garnishment proceedings (except the general statute as to supersedeas which we discuss hereinafter) provides for keeping such a lien alive pending appeal.

If respondent's contention is correct, the Commonwealth of Massachusetts has tied up petitioner's stock over a period of several years while its appeal from the trial court's judgment quashing its writ of garnishment has been and is slowly winding its way through the courts. The trial court held this could not be done. (R. 202.)

The applicable Texas law is laid down in *Willis v. Keator*, 181 S. W. 556 (Tex. Civ. App.). In that case Keator sued Whittaker and Moran on a note and to foreclose a chattel mortgage. To impound the mortgaged property, Keator caused a writ of sequestration to be issued. The mortgaged property was seized and sold under court order, and the proceeds were deposited in court. On trial of the case the sequestration was quashed; Keator was denied a recovery; and the money in court was ordered to be paid to Moran by the clerk. Keator appealed but filed only a cost bond. After the time for filing a supersedeas bond had expired, Willis, the clerk, paid the money to an assignee of Moran's.

Subsequently the judgment quashing the sequestration and ordering the fund paid to Willis was re-

versed by the Court of Civil Appeals. Upon a second trial Keator got judgment against Whittaker foreclosing his chattel mortgage.

Thereupon Keator sued Willis and the sureties on Willis' official bond for the $513.80 paid by Willis to the assignee of Moran. The court held that Willis should have paid the money to Moran's assignee, stating:

"No supersedeas bond having been filed, it was the duty of Willis as clerk to pay the funds in his hands to Moran or his assignee, Barnett, in accordance with the order of the court. R. C. S., arts. 2101, 2097; Waters-Pierce Oil Co. v. State, 106 S. W. 326." (181 S. W. 557.)

As a matter of fact, the Commonwealth of Massachusetts, if it had so desired, could have maintained the status quo pending its appeal. Under the statutes of Texas, the Commonwealth could have filed a supersedeas bond instead of an appeal bond, and the filing of such a supersedeas bond would have preserved the status quo pending the appeal.

Article 2270, Revised Civil Statutes of Texas, 1925, provides that an appellant or plaintiff in error "desiring to suspend the execution of the judgment may do so by giving a good and sufficient" supersedeas bond.

It is the contention of respondent (Brief, p. 23) that the Commonwealth of Massachusetts could not have superseded the judgment quashing its writ of garnishment because, according to respondent, that judgment was a self-executing judgment, a judgment requiring the issuance of no process for its enforcement, and, consequently, not a judgment within the

purview of Article 2270. Respondent's contention has been definitely and affirmatively answered to the contrary by the Texas Supreme Court.

In *Houtchens v. Mercer*, 119 Tex. 431, the Supreme Court stated that our statute relating to supersedeas bonds (Art. 2270) "does not except from its operation any class of judgments. . . . In our opinion what is meant by suspending the execution of the judgment under the provisions of Article 2270 is suspending the enforcement or carrying into effect of the judgment. Of course this would include judgments that require the issuance of process to enforce them as well as those *that are self-executing.*" (119 Tex. 446.)

The Houtchens case is the controlling case in Texas on this point. Many other cases such as *Bryan v. Luhning*, 106 S. W. (2d) 403 (Tex. Civ. App.), might be cited.

Respondent contends (Brief, p. 23) that the Commonwealth of Massachusetts could not have superseded the judgment quashing its writ of garnishment because the judgment was in effect "a take nothing judgment."

But what respondent overlooks is the fact that the judgment quashing the writ issued to the Commonwealth of Massachusetts changed the status quo. What that judgment did was to dissolve the writ that had theretofore been issued and to discharge the garnishee; what that judgment did was to change the status quo.

That the Commonwealth of Massachusetts could have maintained its garnishment lien in effect pending its appeal by the filing of a supersedeas bond is demonstrated by cases involving orders dissolving

temporary injunctions. The law in Texas is this: When a party secures the issuance of a temporary injunction and the temporary injunction is thereafter on motion dissolved, the party that had the injunction can supersede the order and keep the injunction in effect pending an appeal. *G. C. & S. F. Ry. Co. v. F. W. & N. O. Ry. Co.*, 68 Tex. 98; *Lee v. Broocks*, 111 S. W. 778 (Tex. Civ. App.), writ refused; *Murray v. Humphrey*, 132 S. W. (2d) 444 (Tex. Civ. App.).

The above cases are analogous to the instant case. In each of them the plaintiff, starting off with nothing, got the court to issue him a temporary injunction. Thereafter the injunction was dissolved, placing the plaintiff in the same position as he was when he started his litigation. Yet in each case it was held that the filing of a supersedeas bond superseded the order dissolving the injunction and that the injunction continued in effect pending the appeal.

Even if it be admitted for the sake of argument that the Commonwealth of Massachusetts could not have filed a supersedeas bond, respondent's contentions here are in no way helped because the fact remains that a garnishment proceeding is an extraordinary proceeding, and before garnished funds can be tied up, pending an appeal from a judgment quashing a writ of garnishment, some statute must be pointed out that so ties up the funds. Respondent has pointed to no such statute, and it cannot point to one unless it wishes to invoke the supersedeas statute.

Respondent cites *Humble Oil & Refining Company v. Andrews*, 285 S. W. 894 (Tex. Civ. App.), writ refused. That case illustrates as clearly as anything

could the false assumption underlying respondent's whole argument and the soundness of our contentions. The case referred to was a case involving an *attachment*. The amended attachment statute, Article 303, Revised Civil Statutes of Texas, 1925, provides:

"If the attachment be quashed or otherwise vacated by interlocutory judgment or order of the court, the . . . property or the proceeds of the sale thereof, if the same has not been replevied, shall remain in the hands of the officers *pending the final disposition of the main case and until it shall be finally disposed of, or until the time for perfecting an appeal has elapsed and no appeal has been perfected, when said order disposing of the property shall be carried into effect.*"

The above statute specifically provides that after the attachment is quashed the status quo shall be maintained pending an appeal. Respondent can point to no statute that preserves the status quo pending an appeal from a judgment quashing a writ of garnishment. The very case relied upon by respondent demonstrates that, before the status quo can be maintained in an extraordinary proceeding of the kind involved here, there must be some statute to maintain the status quo.

In connection with its contention that the pendency of the appeal in the garnishment proceeding tied up petitioner's stock, respondent quotes from *Commonwealth of Massachusetts v. Edgar B. Davis* (Tex. Civ. App.), opinion not yet reported (Brief, page 4.) That case involved an appeal by the Commonwealth of Massachusetts from a judgment in Davis' favor for damages in the sum of $550,000.00.

Davis was given such a judgment in the trial court for damages suffered by reason of the depreciation of his stock while it was impounded by a writ of garnishment issued in 1937 and in force until it was quashed in 1939.

The questions before the court in the above case were: (1) Was the garnishment proceeding properly quashed in October, 1939? (2) Was Davis entitled to $550,000.00 as damages allegedly caused him because his stock was impounded from 1937 until October, 1939? The court held the garnishment was properly quashed and that Davis was entitled to his damages. There was no question in the case as to the effect of the writ of garnishment *after the writ was quashed* and no question as to the effect of the appeal by the Commonwealth of Massachusetts from the judgment of the trial court quashing the writ. Hence, the court's statement that the garnishment continued in effect after the appeal was taken is mere dictum. The opinion referred to has not been passed on by the Supreme Court of Texas and has not been approved by that court. Insofar as the dictum in question is concerned, it is contrary to the holdings of the Supreme Court of Texas in the cases hereinbefore cited and discussed.

The dictum referred to is based upon the opinion of this Court in *Mackenzie v. Englehard Co.*, 266 U. S. 131. In that case this Court held that under the law of Kentucky a corporation which, with notice of an asserted lien on stock, transfers the stock, while a suit to enforce the lien is undisposed of and on appeal without supersedeas, is liable for the value of the stock to the lien holder whose lien is finally established by judgment. The Court held that the

Kentucky rule of law as to *pendente lite* controlled.

The Court further held that the Kentucky statute providing that "an appeal shall not stay proceedings on the judgment unless a supersedeas be issued" was not applicable because "there was no question . . . of any proceedings on the judgment."

That case is not in point here because the Court was construing a statute of the State of Kentucky, and not the supersedeas statute of the State of Texas. Furthermore, the Kentucky courts hold that a judgment quashing a writ of garnishment can be superseded under the statute referred to; and hold that, if no supersedeas bond is filed, the parties are placed in the same position as they would have been in had no writ of garnishment ever been issued. *Stephens v. Willis*, 21 Ky. Law Rep. 170.

That case demonstrates that the law of Kentucky is exactly the same as the law of Texas in so far as the question before this Court is concerned.

The next point we want to discuss is respondent's untenable contention that the judgment quashing the writ of garnishment issued at the behest of the Commonwealth of Massachusetts was premature; that the court should have awaited the outcome of the main case; that its failure to do so left the bond, given by the Commonwealth of Massachusetts when it secured the issuance of the writ, in full force and effect. (Brief, page 23.) We are at a loss to understand the materiality of this contention because, in the first place, the trial court's error, if any, could only be corrected on appeal. It was not the duty of respondent to voluntarily correct the error, if any, by freezing petitioner's stock on its books.

In the second place, the proposition of law asserted

is incorrect under the Texas decisions. In *Roberts v. Stoneham*, 31 S. W. (2d) 856, 857 (Tex. Civ. App.), the court says:

"While it is true that garnishment is a species of execution and ancillary to the main suit, nevertheless it involves other parties, in this instance the garnishee and the claimants of the fund, and is regarded as a separate proceeding for the purposes of appeal. It has been uniformly held that an appeal will lie from a final judgment in garnishment, independently of the action in the main case. . . . *It does not follow, however, that a final judgment may not be rendered quashing the garnishment writ and discharging the garnishee until after judgment in the main suit.* The same reasons for such holding do not exist as in the case where the judgment is against the garnishee. It might be very important to the garnishee or to some other person claiming the fund to have a speedy determination of the issue of whether or not there was a valid impounding of the fund, or whether the defendant was its true owner, and, where the holding and judgment of the trial court is to discharge the garnishee from liability, such judgment we think should be held to be final, regardless of whether there had been any judgment in the main suit. This appears to be the holding in Walton v. Bank (Tex. Civ. App.), 185 S. W. 369. See, also, 3 Tex. Jur. 109."

It is no defense to petitioner's action for damages for respondent's conversion of his stock that respondent if held liable for the conversion will thereby acquire title to the stock because (1) respondent did not plead any such defense, and (2) the law of Texas permits a corporation to purchase its own stock.

Respondent contends that the judgment in this case forces it to purchase its own stock. For this reason respondent asserts that it should not be held liable in conversion, but that a softer remedy should be forced on petitioner—that is, that petitioner should be left to a mandamus proceeding to force the transfer. (Brief, pp. 26-28.) Respondent had the opportunity to prevent any suit for conversion by transferring the stock when petitioner presented it to respondent duly endorsed for transfer, but respondent refused to act, and it now says that petitioner should not be permitted to avail himself of the remedy provided by the law of Texas—that is, a recovery against respondent of his damages for the value of the stock converted.

The record shows that the defense now asserted by respondent is an afterthought. Respondent did not plead that to hold it liable for conversion would force it to purchase its own stock to the prejudice of its creditors (R. 6-15); and that defense, if a defense, is one that respondent should have pleaded below. Furthermore, respondent offered no evidence to show that its creditors would be in any way prejudiced by a judgment for conversion in favor of petitioner. The court's finding that respondent's common stock was worth $8.05 per share is necessarily a finding, if any was needed, that respondent had assets that were more than ample to take care of its creditors who would not therefore be prejudiced or injured by respondent's purchasing some of its own stock.

And finally, under the law of Texas, a corporation can purchase its own stock. *San Antonio Hardware Co. v. Sanger*, 151 S. W. 1104 (Tex. Civ. App.), writ

refused; *Rowan v. Texas Orchard Development Co.*, 181 S. W. 871 (Tex. Civ. App.), writ refused.

We submit that the trial court correctly laid down the law governing this question. (R. 203-204.)

Conclusion

We respectfully submit that the petition for writ of certiorari should be granted.

Attorneys for respondent are Messrs. Ike D. White and H. Grady Chandler, both of Austin, Texas. Copies of this brief have been given these attorneys.

Respectfully submitted,

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